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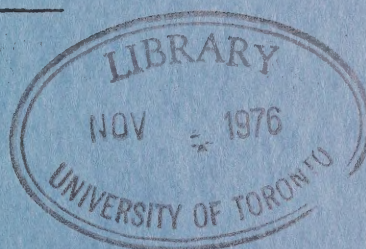
ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

M E E T I N G

held at

The Frost Building, Queen's Park, Toronto, on

FRIDAY, SEPTEMBER 20, 1968



VERBATIM REPORT OF PROCEEDINGS

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

Meeting held in the Board Room, 5th Floor,
The Frost Building, Queen's Park, Toronto,
on Friday, September 20, 1968.

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

PRESENT:

Mr. I.M. Macdonald (Chairman)

Prof. A. Brady

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Mr. R.A. Farrell

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Mr. E. Greathed

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Sece

FRIDAY, SEPTEMBER 20, 1968

--- At 9.40 a.m.

THE CHAIRMAN: I would like to welcome you back to the new season, as it were, and in particular to say how pleased we are to see that Bill Lederman is back and in full flight, as I would observe, after your illness, Bill.

DEAN LEDERMAN: Thank you, Mr. Chairman.

THE CHAIRMAN: Very glad that things are going well.

Mr. Magone will not be here this morning, nor Mr. Seguin. Mr. Gathercole and Professor Fox will be here later. Craig McIvor is on leave of absence this term in London, England, and so he has a sabbatical from the Committee but will return in due course. Mr. Stevenson is in Ottawa today attending the meetings of the tri-partite group who are studying the National Capital question, so he is busily engaged in associated matters.

I suppose quite a few things have happened, both locally and nationally, since we last met in June on the local front.

Two things that would be of interest to you, I think, are July 23rd the name of the Department and the arrangement under which we work here, was officially proclaimed as the Department of Treasury and Economics. So that now after a year

of transition, the re-organization which was taking place in the Government is now completed, and I think, at least I trust, we will settle down for a while.

Secondly, the language resolution was, as you know, passed in the Ontario Legislature during the last week of the session in June.

Thirdly, I think Ed, you might wish to comment on changes and additions to the staff of the Secretariat.

MR. GREATHED: First of all, I might just mention that regrettably we lost Miss Jocelyn Côté to the Company of Young Canadians - not that she thought the Company was more attractive than the Secretariat.

THE CHAIRMAN: I thought it was to the company of a young Canadian (laughter).

MR. GREATHED: She is getting married to a fellow in Ottawa, and unfortunately we lost her.

I would just like to introduce a new member of the staff, Mrs. Judy Wilensky, who is sitting at the wall there. Mrs. Wilensky comes to us from Barnard College in New York City and the University of Toronto.

I might just also mention that tomorrow Mr. Peter Lishchynski whom we met at the last meeting, will be getting married.

I think that just about completes the "births and marriages" and other announcements in the Secretariat.

THE CHAIRMAN: Thank you very much.

Well, in the wider sense, I would be appreciative if we could have some discussion of these matters during the day and have the benefit of your advice and thoughts and observations.

Shortly after our last meeting, of course, a national election was held. Shortly thereafter the Prime Minister of Quebec took ill. In turn we have seen the St. Leonard troubles; very recently the change in the language matter in the Province of Quebec.

We have ahead of us in the next two months a series of federal-provincial meetings on a number of questions; not the least, the question which in many ways, I believe, is becoming almost of greater crisis proportion than the constitutional question and that is the recognition of the very serious financial condition which the governments of this country find themselves in. I think this was illustrated by the extent to which our own government the other day broke all traditions of budgetary secrecy and the normal sort of caution one tends to use about one's financial affairs, by simply setting out a financial picture which is quite certain over the next four to five years in the provincial context. This is a picture which is repeated across the country in other provinces, and one in which the federal government now also shares.

I must say that at the Premiers' Conference in Saskatchewan this summer, I do not think I recall in my brief experience at least, any item which attracted either the unanimity or the depth of concern which this question carried. So that both the general constitutional and federal questions, but I think perhaps more immediately the financial questions, are going to be ahead of us in the next few months.

Perhaps before we get into the business of the propositions, it would be very helpful to me and I would appreciate it if we could have some discussion and some consideration of how you believe these events have affected or should affect the thinking of the Ontario Government - the events of the election, the events in Quebec and others - because we are busily trying to re-appraise our present position in terms of what we have done recently and what we may find ahead of us.

Perhaps in fact before we go on to the next two items, which are reports of an administrative nature - the future work of the Committee and the reports of the task forces - then, as I said, what I thought should be the main business of the day, a consideration of the types of propositions we have been debating here; it might be useful if we commenced at this time and had some general discussion of the events that have taken place in the

last few months.

MR. PERRY: Mr. Chairman, I wonder if to what you have said you could anything of interest about the various meetings and the constitutional progress itself. There have been one or two of these, haven't there?

THE CHAIRMAN: Yes, and that is item 4, but there is no reason why we should not go to it now, which may complete ---

MR. PERRY: It just seemed to me it is part of the recent background.

THE CHAIRMAN: --- may complete the recent background before we get into the future, and I am going to ask Mr. Greathed to deal in more detail on this subject also.

Briefly I can say that the officials have met on two occasions, at the end of May and towards the end of July. Perhaps the most striking impression one has, as participants in the exercise, is the imminent danger of being overwhelmed by a flood of paper. I had to buy a new filing cabinet in my office, and this is being duplicated across the country. That is a small point but nonetheless is significant in the sense that it is a comment on the number of considerations that such an exercise involves and the very difficult practical question of how you sort things out and how you proceed and what is the proper approach to

take to it.

In the course of these two meetings, there was some discussion about how much public knowledge should come out of these meetings. We have taken the view that these are meetings of officials; and whereas our own government leans in the direction of having these matters before the public at the political level, we felt that at the level of civil servants we are not in a position to ourselves engage in public dialogue, as it were, on these matters.

What has concerned us is that in a sense the real issue is: what degree of decision-making can the officials have? On the one hand, if no progress towards a consensus can take place among the officials, we are not going to get very far. On the other hand, if some consensus is taking place, it is taking place in the wrong place, rather than taking place among the elected Ministers.

Therefore, our own feeling was that it is desirable to have quite soon another meeting of the Prime Ministers and Premiers to define a little more clearly both the procedure and the scope of the Committee of Officials.

Mr. Trudeau has written to the Premiers on August 15th, and proposed that a meeting might take place late in November or early December.

I suspect that that will be generally acceded to, because every Premier at the Conference of Premiers in Waskesiu in Saskatchewan did express some concern about the danger that the Officials Committee might run ahead of the politicians' work.

Now, as I say, we have had some little difficulty, really, and not surprisingly, in deciding on a methodology. Perhaps at this point you might like to add some remarks about the type of difficulties we have, Ed.

MR. GREATHED: Well, Mr. Chairman, I might just mention that I think in addition to what you have said, that in general the progress has not been very dramatic. I think at the same time, however, no one really expected this, although I think some perhaps hoped for a faster rate than has been the case to date.

I think there has been the necessity of creating a certain atmosphere among officials, in much the same way that I presume an atmosphere had to be created within this Committee in the course of their very early discussions; just getting used to meeting with one another and talking about a variety of issues which I think, rather significantly perhaps, were not discussed at at least the official level until a very short time ago.

The enormous mass of material which the Chairman has referred to, has been very usefully

placed in categories and to a certain extent has been synthesized by the Secretariat to the conference under the direction of Mr. Ed Gallant.

What we have tried to do in the second meeting in Ottawa which took place after the last meeting of this Committee, was to take these categories one by one and simply proceed to have a discussion of the various propositions which had been submitted under each category.

I do not think any particular attempt at this very early stage was made to reach a consensus particularly, far less perhaps to reach any decision on these matters; but certainly I think the idea was to permit the members of the Committee to air their ideas in a fairly frank and confidential fashion.

A number of problems have arisen, I think, which will deserve our attention in the coming months. The chairman has referred to some of them. One of them is the rate of progress which, as I said, has not been as quick as perhaps some expected, but, on the other hand, has been rather characteristic and a reflexion of the difficulty of the exercise.

Mr. Trudeau in his speech to the Canadian Bar Association in Vancouver last month referred quite publicly to the uneven participation of the participants in this exercise. I think

this has been a real problem - a question of how much consensus and progress one can make if all governments are not submitting their views.

To date, I think about six governments have formally submitted views, but there remain another five to come into the exercise in a formal way.

Another matter which I think is a problem, and one which is rather difficult to determine, given the nature of progress we have made so far, is that given the conference of Prime Ministers and Premiers which, as the Chairman has said, is likely to take place towards the end of this year, the question is really how and in what form we can present material to the Continuing Conference of Prime Ministers and Premiers and how we can do it in such a manner that this particular conference will be able to proceed at the maximum possible speed.

Another problem which I think has concerned the officials has been the question of the object of the exercise. What are we really here to do; what is the extent of the review? I think it is fairly plain that different governments have different views on this.

Now, these are questions of a considerable political order, and will have to be decided at that level; but I think those are in general some of the

kind of problems and difficulties and so on that we have run into.

I do not want to sound too negative about this, because I think we have all been rather heartened by the kind of discussions that we have had both at Mont Gabriel and at Ottawa in July, and I expect this will continue next week in Ottawa. I don't know, Mr. Chairman, if that completes what I have to say.

THE CHAIRMAN: I think that is fine.

MR. GREATHED: I don't know whether Charles is prepared to say something on the official languages sub-committee, if you would like to hear from him.

THE CHAIRMAN: I think it might be appropriate.

MR. BEER: I think, Mr. Chairman, the remarks concerning the speed and also the diversity of work which the various provinces are doing or planned to do is equally evident in some of the problems that the sub-committee on the official languages has found.

We had the first meeting, and to date the only meeting, on July 4th and 5th in Ottawa. All the provinces were represented except for Saskatchewan and British Columbia at this point, although they did send word that they would be participating at later meetings.

The Quebec delegation, I think I should point out, the head of the Quebec delegation was Mr. Guy Fregault, who was Deputy Minister of Cultural Affairs and has now been moved into the Department of Inter-Governmental Affairs in charge of international programmes, whatever that exactly means.

I would like to point out that the participation of the Quebec representatives was very co-operative, very helpful, and they told the meeting that they placed the highest importance on the work of this sub-committee, and we are hoping that this viewpoint has not changed.

The main topic discussed at the first meeting was to go through the various recommendations of the Royal Commission on Bilingualism and Biculturalism to get the reactions of the various provinces; and where action had been taken the province remarked on the results of its programme and what it was planning to do in the future.

This was essentially an exchange of information. It was agreed at the beginning that no definite decisions would be taken at this first meeting. We wanted to get some idea of just what the scope of the programmes was that were being thought out, what that scope was.

There was also a brief examination of federal financial aid, and varied opinions were

expressed. Again no decision was taken.

At one point the Quebec delegation did tell us that it was important to their policy to see what amount of money each provincial government would be willing to put into an extension of bilingualism. They pointed out that since 1867 and before they had in effect been paying for bilingual services in their province, and that they would be impressed if all the other provinces would at least take on a share of these costs, a share of their own costs in their own province, and not simply to go to the federal government asking for the federal government to pay for all bilingual programmes at the provincial level.

DR. FORSEY: I don't think I got that quite clear. Would you state it again?

MR. BEER: They said they had been paying in Quebec for bilingual service at the provincial level.

PROF. CREIGHTON: That is a constitutional obligation which the other provinces have not got.

MR. BEER: But beyond that, they had been extending the use of the two languages throughout Municipal Affairs and in certain of the judicial bodies and certain of the boards and what-not; and they claimed, at least they hoped that the other provinces, when they came to implement certain programmes which would extend the use of French in

its province, that they would not all go running to Ottawa and asking Ottawa to pay for everything, but that the provinces would try and assume at least some financial responsibility for those programmes.

DR. FORSEY: What an extraordinary comment! Are you assuming then that they would go to the government in Ottawa?

MR. BEER: Well, I think it has been clear from comments of some of the provinces that that would be what they are thinking they are going to do.

The Quebec delegation was simply suggesting that there was an element of sacrifice here; that each province would have to show its good faith by paying for at least part of the various bilingual programmes that are implemented. This was a point which they made with a certain degree of emphasis, and it was noted by everyone around the table.

All this discussion of the Continuing Committee was really just an exchange of ideas, and nothing definite was decided at all. Apart from changes in educational policy which various provinces announced that they had started or were going to start, there was not anything really of a significant nature that occurred.

It would appear now that all provinces have either begun or are going to in the near future make, some changes in French Language education for

French-speaking peoples. All of this is being done at the provincial government level except in British Columbia, where for the moment the change that has occurred has been in the local school board in Coquitlam, where they have allowed the school board to give instruction in French, but it has not been the result of any provincial legislation or permission.

DR. FORSEY: Incidentally, was there any discussion of whether the French language instruction would be confined to people of unimpeachably French origin?

MR. BEER: No, there really wasn't any discussion on this particular point. There was discussion of improving the teaching of French to English-speaking pupils, but we really did not get into an investigation of whether, say, all English speaking pupils of a truly bilingual school, such as might be the case in Ottawa where you do have in the Separate Schools essentially English-speaking pupils taking French language courses - this was not gone into to any extent at all.

I think essentially that is what the discussion was around, the B and B and financial aid. The next meeting is in the middle of October, about 18th October. Again, the various problems that have arisen have been essentially ones of the disparity in which various governments feel they can

contribute with Quebec, Ontario and the Federal Government.

On a technical level there is a great deal of information that can be exchanged and is being exchanged, about how to begin certain kinds of programmes, and along that line there is a great deal, I think, to be done, but the more general agreements are going to be much slower; developing the same kind of programme all across the country, getting other provinces to extend bilingual services to a much greater extent than they have. Outside of these four governments it is going to be slow getting any agreement on these things.

THE CHAIRMAN: I would like to hear what is your thinking. Ted McWhinney, you have been swinging from Montreal to Madras, Toronto to Tokyo, Calgary to Caracus.

PROF. McWHINNEY: Briefly in the Far East and briefly South America. I came in late this morning from Montreal and I must apologize. I meant to ask you about the Officials Committee. Is it in fact a homogeneous body? I was surprised to have somebody speak to me and tell me he was going to the meeting next week, and I would classify him as a publicist rather than an official.

It seems the problems of getting consensus are greater if in fact your committee is not limited to officials.

I would be intrigued to know who the Quebec people are or what categories of people are coming from Quebec, and perhaps from the other provinces.

Secondly, I am curious about the paper work that you mentioned. Is it a fact that all the provinces have been doing what we have been doing over the last four years, presenting masses of reports? Is this what all this paper work is?

THE CHAIRMAN: In the first place, I think the person you refer to is in fact an official publicist, or so it would appear. Dean Cohen is official adviser and member of the New Brunswick delegation.

PROF. McWHINNEY: But his skill is surely rather different from what we would describe as a continuing committee of officials. The emphasis changes the moment you get a publicist in. Is this rather an exception?

THE CHAIRMAN: Yes, it is. First of all, I should say Dean Cohen is the only non-permanent official, as it were, who is involved in the exercise on the provincial side.

MR. GREATHED: Dean Ryan, I think, from New Brunswick.

THE CHAIRMAN: Yes, New Brunswick also has Ryan of the New Brunswick Law School, I have been told.

On the federal side it is sometimes difficult to know where outside advisers leave off and officials begin, but I presume that Professor Baetz and Mr. Goldenberg are in fact part-time advisers but somewhat involved also in the detail of the government work.

The committee is highly heterogeneous, and I think, without intending to be derogatory, let us say rather uneven.

PROF. CREIGHTON: Goldenberg has had his nose so strongly in the public weal in the last twenty years, you could call him part-time.

PROF. McWHINNEY: He is now being called "constitutional expert" which is surprising. He is a very able man but he is more of a labour lawyer, which I think is how he made his name.

THE CHAIRMAN: You see, the problem is that for most of the provinces there is not a single focal point to the activity in this area. Consequently most of the officials who are participating in that are doing this very much as an extra event to their normal duties, and they do not really have supporting staff behind them.

PROF. CREIGHTON: Could I ask you, through Mr. Greathed, who are the provincial governments concerned when you use the phrase "not participating in the sense that they have not submitted a formal statement"?

THE CHAIRMAN: Well, I was going to add just one more point there also, that the officials are drawn from rather different realms. Some are lawyers, some are economists, some are executive officers from Prime Ministers' departments and so on. The depth of contribution varies very much, I think, with the available staff of the different governments.

This brings us to Professor Creighton's point. The governments who have taken most active interest, and in turn have submitted official papers and propositions, are the Federal Government, Ontario, Quebec (which is represented by the Deputy Minister of Inter-Governmental Affairs and members of that department) and New Brunswick which has been very active in its contribution, Nova Scotia. Interestingly then, the four founding provinces and the Federal Government are the active group in this exercise.

The other provinces who have, I think, taken an interest to the extent of their resources, in the discussions, would be - you perhaps might go on from here, Ed.

MR. GREATHED: I guess I would add British Columbia to your list. They have submitted propositions.

THE CHAIRMAN: Yes.

MR. GREATHED: In mentioning that those

provinces which have not submitted propositions are not participating, I meant in a formal sense. They are participating in the actual discussions, but they simply have not submitted formal propositions as such.

This means, as the Chairman has mentioned, Nova Scotia, New Brunswick, Quebec, Ontario and the Federal Government and British Columbia have submitted formal propositions.

PROF. CREIGHTON: I think as a matter of fact they haven't much to submit.

DR. FORSEY: And their resources for doing so, to some extent at least, would be pretty limited, I should think; especially if there were any reason to feel unwilling to draw on such talent as Dean Cohen and Professor Ryan. I should think the reason New Brunswick is doing that is probably because its resources within its own official civil servants for this purpose are limited.

PROF. McWHINNEY: I was not making criticism. It just seemed to me, when I mentioned a publicist, a continuing committee of officials can reach a consensus such as the Chairman described, but the moment you bring in the alien element it becomes a new ball game. A publicist tends to make speeches; officials tend to discuss.

DR. FORSEY: Does the Ontario delegation, or whatever it should be called - the Ontario people

taking part - do they include any people from the Attorney General's Department?-

THE CHAIRMAN: Oh, yes. The principal spokesmen for Ontario in that group (if we can use that term) are the Deputy Attorney General and myself.

DR. FORSEY: Because as I read these predecessors of this document we have before us, I have been struck by what seemed to me to be the absence of, or what appeared to be the absence of any consultation of the Attorney General's department. Judging by something that one of my colleagues said, I gathered he also was surprised by certain things in there which, I should have thought, would scarcely get in if the Attorney-General's Department had looked at it.

I was also struck by the extreme imprecision of language in many cases, which did not seem to me to be the fruit of a legal education; even by the carelessness of punctuation.

It seems to me that in anything that is to be made the basis of a legal document, precision of language, and even precision of punctuation, is extremely important.

Over and over again, as I read these documents and see the loose fashion in which they were drafted, I find it quite incredible that they could have been so drafted if the Attorney General's department had been consulted.

THE CHAIRMAN: As I say, the Attorney General's Department is working side by side with us. Perhaps you can report on the nature of that association, Ed, in a moment.

As far as the precision is concerned, without backing away at all from the point you make, Eugene, I would emphasize that we are not setting about drafting a constitution in this exercise. In a sense, this whole outpouring and input has been designed to begin (to use that horrible word) the dialogue or the multilogue. In that committee I feel I have been through it all before, in the sense that when we began our proceedings we were really in this Committee going all over the place trying to get hold of the thing, and deciding "where do we go, what is involved?"

As I say, it should not be thought that one is, in that committee, very close to any firm constitutional revision, although I fully agree with the point you are making that these habits of mind should not be introduced even at the earlier stage.

DR. FORSEY: I know you are not drafting clauses, but on the other hand, if you put something down here as an expression of the opinion of a number of officials and it is not carefully phrased, you may some day find yourself stuck with it. When you start to draft something and you put something

which is not precise, somebody says "that is not what you said. Are you backing away from this?". You may get a good deal of recrimination and bad blood arising out of the fact that originally you have not expressed yourself with enough clarity. There is a little bit of danger, I think, in the desire to be too amiable, and it is not in my mind any basis for constitutional discussion. Better to know exactly what it is you are trying to say, although you may subsequently modify in the light of your discussion, but at least you will know what you are doing all the way along instead of having something quite airy.

PROF. McWHINNEY: Mr. Chairman, I would be interested perhaps in your comments on the Quebec position and the changes you expect in the light of most recent events; because I suppose your planning for next week includes contingency planning based on positions other parties may take.

When I came back from Asia after the Federal election there was agreement that Mr. Trudeau would have what in American terms used to be called a "honeymoon period" - the new president gets two years in which he implements his policies. The striking thing one notices now is that the time period shortened and almost began with the Speech from the Throne last week.

If you look to Mr. Tremblay's speech made

yesterday and in this morning's papers, you can see that new policies have emerged in Quebec. It would seem to me that a lot of the action taken by this Committee was posited upon taking positions which were reasonable in the light of a situation existing in the Province of Quebec.

If as a result of this St. Leonard affair - which was a huge affair in Quebec and caused a taking of positions by people in public, if it was a result of that and Mr. Tremblay's speech and one is moving towards in fact a unilingual province, then it may disturb assumptions, for example, on which the Ontario and other provinces' positions were taken.

You can make a case for accepting the principle of according language rights to school instruction, if the assumption is nation-wide and this would be a general policy. If, however, the momentum was set up of the province going unilingual, it may be that the case for the other provinces remaining unilingual is strengthened.

The St. Leonard affair shocked people. It was the first time that a case had arisen involving, in effect, the third founding group. As you know, the parents involved here were Italian-Canadians who opted to have their children learn English. I suppose in the most materialistic sense, they felt that English was the language you had to have to make progress here; although some of them to whom I spoke

said: "We speak one Latin language, and we would rather learn a Germanic language as the second language".

I would be interested in your comments particularly in the light of what seemed to me, from your earlier remarks about the attitude of Quebec officials that you had a very reasonable, very constructive approach presented to you in these earlier sessions - which seemed to be very compatible, as I gathered, with policies the Ontario Government has been pursuing.

THE CHAIRMAN: Well, it is true that throughout the discussions to this point the attitude of the officials has been very open and highly co-operative. It is also true that at the Premiers' Conference at the beginning of August, where Quebec was represented by Mr. Bertrand on behalf of Mr. Johnston, their contribution again was very open and much appreciated.

The great imponderable, of course, is exactly what significance one can attach to the absence of Mr. Johnston during these last two months. Certainly it is pretty clear to everyone the extent to which he carries the situation himself there. I am not suggesting that some things are happening in his absence that would not have happened; but the way in which they happen may well be affected by that absence.

I simply do not know whether the speculation that the Government of Quebec has chosen to fortify itself with and to restore its sense of balance against what happened last June 25th by seizing on the language issue, is a calculated policy or not. I am not sure and I think one would have to wait and see.

There is no doubt that we have given some thought to how this has affected progress which we have made in Ontario, and in turn what the limits of public tolerance would be.

If one interprets the last election on June 25th, in which Mr. Trudeau, on a campaign of equality of language, swept Ontario, if that is to be a yardstick ---

PROF. McWHINNEY: And Quebec.

THE CHAIRMAN: And if Ontario supports this kind of view and therefore the steps which Ontario have been taking are in the right direction; again, however, whereas we might have come this far without changes in the national scene and particularly in Quebec - although we should remind ourselves, as the Prime Minister of Ontario said the other day, that what we have been doing in Ontario has not been for the purpose of pleasing Quebec or anyone else: it has been essential for reasons which the Government has thought to be right in the Province of Ontario.

DR. FORSEY: Here! Here!

THE CHAIRMAN: I know his determination

to adhere to that position, but Quebec I don't know, and I think I would like to hear what your views are as members of this Committee; because, needless to say, we are having to appraise this very carefully and I would like to know how you feel.

MR. GREATHED: Mr. Chairman, I might just respond, if I may, a little to what Dr. Forsey said, which is in way of explanation.

Over the years I think we have in the Secretariat learned to rely very heavily on the advice of the members of this Committee; and I think that in many instances you gentlemen, if I may use the expression, are our first line of defence or attack in a sense; and if we really do send you out material that is admittedly in very raw form, the intention is not to waste your time but the intention is to get frank and candid opinions on some of the ideas that are being very roughly considered - and they do not necessarily go all through the departmental levels and so on before they are sent to you. I think we like to have these outside opinions. It is very helpful.

However, I do want to emphasize the point, and I think the Chairman made it in part, that nothing is submitted to Ottawa in the sense of formal submissions of this Government, until it has been cleared by a number of departments, including that of the Attorney General and that of the Prime Minister.

I would just like to make that observation so that the process is understood. This is not to take away from your comments, because I think they are quite valid, but I do want to reassure you on this point, that it does not go straight from the Secretariat to Ottawa.

DR. FORSEY: This is what I was afraid of. When we got this thing over the Labour Day weekend, when I happened to come into my office Saturday, there was very little opportunity to work at all carefully on these things, and I should have liked to consult certain Acts, for example, but the library was closed. After I had sent off my rather explosive comments - and you wanted to get candid opinion --

MR. GREATHED: Yes, and we appreciated it very much.

DR. FORSEY: After I sent them off, it occurred to me that I might, on further reflection, have felt that I had mis-interpreted something you had said and I might have changed my comments in some degree accordingly; but the haste which was imposed on us by the arrival of this thing during that particular time and the request for comments by the following Thursday, this made the whole business extremely difficult.

I think if this kind of thing is going to go through as the official opinion of the Province

of Ontario with only the necessarily rather hurried comments of at least some members of the Committee --

MR. GREATHED: No, no.

DR. FORSEY: Of course, if you are a legal expert, like some of the people here - Dean Lederman, Professor McWhinney and others, who are learned in the law, this is no difficulty at all. You won't need to consult libraries, don't need to look at wording of the Acts: you have them in your head. Other members of the Committee may be in the same position.

If our lay comments may be sometimes of some value, they would be more valuable if we have the opportunity to reflect for a few days and consult books; and the whole thing, I am relieved to hear, will be very much more satisfactory if the legal experts in the government's own service are consulted.

MR. GREATHED: Very definitely.

DR. FORSEY: Because this is absolutely essential.

THE CHAIRMAN: Again I would apologize for the short time in that instance, and I have asked the Director of the Secretariat to see if we can burn even a little more midnight oil, if necessary, to expedite this on another occasion.

I do want to say that I feel, as I have said before, that now is the time when this Committee can provide us with the greatest service and the

greatest advice, because we are at the day of reckoning, as it were: we are dealing with a negotiating exercise leading to change and we recognize our limitations. I certainly do not want anyone to feel for any reason he should spare his comments or criticism of any kind, because we are very much dependent upon them now, and we will try, as we go along, to make arrangements to give you more adequate opportunity.

MR. GREATHED: Reflecting the other day, I could not think of anyone since Euclid who had written propositions. It is a very inexact science, and we are all struggling along to do our best.

MR. PERRY: This has since been abandoned.

DR. FORSEY: I do not want to emulate the fellow mentioned by Sidney Barrett on one occasion, describing a voyage on a vessel the crew of which, as he said, included "seven Germans, three Frenchmen, two Americans, seven Dutchmen and me, and I am the h'only man that can speak h'English". I do not want to emulate him, but I still think it is advisable to look at the wording of these things carefully and determine that you are saying exactly what you mean.

DEAN LEDERMAN: Mr. Chairman, on this point may I make a comment. There is one difficulty, I think, occurs in all large and complex

organizations, and that is that the people at the top often find themselves in the position of imposing time limits on the staff of their organization (in this case the Secretariat) which are very hard to meet. You know, it is an old story of big organizations that people at the top want something very complex and they want it tomorrow.

THE CHAIRMAN: Or yesterday.

DEAN LEDERMAN: Or yesterday. This, I am quite sure, is a large part of the difficulty, and this is why I expressed in my letter some weeks ago the need to permit us more time for comment, if you can.

I think I also recognize that it is not necessarily a process you can control, and it may be only Mr. Robarts can create a situation where there is more time for consultation. It is a very complex business to take a large governmental organization like that of Ontario and attach an Advisory Committee to it; then to establish a Secretariat and co-ordinate the Advisory Committee, the Secretariat, the Departments that have to be concerned, the senior civil servants and so on - and all this has to end up, in its more crucial aspects, at the Cabinet level. The process is very complex, and therefore some of the people somewhere along the way are going to get squeezed

in the time factor.

THE CHAIRMAN: Well, you know in this particular instance, Bill, I found that an organization of this kind, like the Committee, tends to generate a certain momentum of its own; then it is the permanent Secretariat who feel very much an obligation to crack the whip in turn.

Frankly, they have been throughout pushing us to get things in on this and that, and I have been resisting in many cases, I hope stopping short of perversity, and saying: "We will come along when we are ready, and if it takes another meeting, that is all right".

However, you are quite right: the thing tends to inflict a kind of haste which is not warranted or desirable.

DEAN LEDERMAN: I think my impression is that within the Government of Ontario these issues have been taken up and are being faced better than they are anywhere else yet. I suspect there are still three - there were as recently as a few weeks ago - three or four centres of power in Ottawa on these subjects.

PROF. McWHINNEY: I think there were three or four centres of initiation that were not reconciled, and I think possibly in Ontario we are further ahead

of them.

I can imagine the difficulties of the

provinces that are just starting in on this. They are just beginning to discover: "Why, we shouldn't have said this in Ottawa without asking the Deputy Minister of Municipal Affairs" and nobody had thought to ask him. I think we all have to recognize inherent complexities of the process.

THE CHAIRMAN: We have one additional instrument too that we have established, and I think this is where the work of this Committee and the work which we have done in the Government over the past three years has been very fruitful preparation; because in the inter-departmental task forces they have been looking at a number of questions, and we have a close working group with Municipal Affairs and Municipal administration, another on Justice, another on parliamentary activity and another with the Civil Service Commission on language instruction and so on. So that we have built up in these three years a fairly good inter-departmental network and chain of events.

As you say, in many provinces, this is now beginning right out of the blue and you remember three years ago how far we had to go to get on track here.

PROF. BRADY: Mr. Chairman, I think a general point might be raised here, and that is the apparent attempted speed of the continuing committee in Ottawa with its programme of constitutional review.

Mr. Trudeau in his speech before the Bar Association remarked he hoped that there would be a conference with the provinces by December, I think he said, or late autumn. Now, I wonder if this is not, after all, overlooking the circumstance that, not considering Ontario or Quebec here but other provinces, if it is not trying to rush the boat unduly.

He also complained of the fact that there seemed to be some provinces that were not participating in the discussion adequately. Well, actually I suspect most of the other provinces have to consider, and certainly feel bound to consider, the whole constitutional situation, but are not as well prepared as, say, Ontario is or Quebec to discuss these matters.

It may be appropriate perhaps for Ontario to introduce a cautionary note on this matter of the programme of the Continuing Committee in general.

What does Mr. Robarts, for example, think of the way in which the matter has been addressed at this time?

THE CHAIRMAN: As you well know, his own style style and approach is to be certain rather than to be sorry, and he has always said they were going to be at this for many, many years. We will go on and keep working at it. I agree, I have been a little concerned with the blind-eye factor manifest there in the federal approach; that whether one likes

it or not, Mr. Manning and Mr. Bennett are very strongly rooted politicians, and whether one likes their ideas or their approach or not or the backing they have, that exists.

The question therefore becomes: in what way do you best bring them along towards some consensus?

PROF. BRADY: If you held a conference that was public in December or November, is there anything fresh, as it were, to say that has not already been said? If there is not, I think it would be a most unfortunate happening.

PROF. McWHINNEY: What is the reason for this conference? Is it a political gesture?

THE CHAIRMAN: I am very interested to hear your views. I would like to hear more, because the Ontario Government has not yet replied to that letter.

PROF. McWHINNEY: I wrote you, Mr. Chairman, a week ago, and I was reminded of the point Bill was making about the possibility of controlling staff, when I found it had not been typed, I thought I signed it a week ago; but it echoed really the sentiments Alec was making and that Eugene made a little time ago, that the Premier arrived at a programme for Ontario based on the work of this Committee, and I think, as I am sure all of us did, was a very substantive programme and right in its

context. I think he should go ahead with it, whatever happens nationally or elsewhere, but my own suggestion to you - and it was before Mr. Tremblay's recent speech of yesterday - was that we should exercise considerable caution in rushing into new constitutional initiatives, because the situation in Quebec is now fluid and the Quebec-Ottawa relationships are fluid again, as they looked as if they were not immediately after the election.

So I would also have grave doubts about a public conference of Premiers. Is it really designed to help the constitutional discussion along, or is it a public show? What is it going to do?

THE CHAIRMAN: Well, first of all let me say that although the origin of the suggestion relates to the constitutional committee and that function, it is true that a number of other matters have been accumulating on the agenda. There has not been a federal-provincial conference of Prime Ministers and Premiers on other matters since October, 1966.

PROF. McWHINNEY: Public conference.

THE CHAIRMAN: Well, one of the regular plenaries, and since that was confined mainly to fiscal matters, in fact the last clearing-house Federal-Provincial Plenary Conference, as it were was in July, 1965. So that there are questions that have built up towards an agenda. That is

the first point.

The second point is that my impression was that the Prime Minister of Canada would like an early opportunity to place the language bill, which will come in shortly, we understand, for its first reading, before a federal-provincial conference for its consideration and consultation.

So that there would be other matters that could be included here, but I agree that the critical point is whether the process of constitutional revision which was initiated last February will be aided or hindered by calling the conference too soon.

I have the feeling from the views of the federal officials on behalf of their government, that simply they feel that the public might be asking what is going on if one gets past the end of this calendar year and nothing more has happened at the political level. That is the kind of political intuition as it were.

DEAN LEDERMAN: My impression is, Mr. Chairman - and it may be wrong - that the need for speed relates to new inter-governmental fiscal arrangements, and that a conference that concentrated on that has to be held soon.

PROF. McWHINNEY: But it need not be televised, this is the issue, is it not?

DEAN LEDERMAN: I don't know. If issues of the scope of this set of propositions are going to be opened up, I would agree that it is premature.

If it is a limited agenda and they are going to re-negotiate the financial agreements - so something just has to be done on the fiscal matters.

THE CHAIRMAN: The financial timetable is the federal government will bring in a budget in the first part of October. They have said that they will then have a federal-provincial conference of Finance Ministers in the last half of October, which presumably will have to come up with something to go finally to the Premiers and Prime Ministers early in December.

Then another event again, as I say, the Prime Minister's letter was directed originally to the constitutional question, but all these other things are in the hopper and I do not think frankly that if that meeting did deal with constitutional matters, I do not think it would be debating propositions or options or alternatives: I think it would be attempting to clarify procedure.

Here I must mention again that one or two Premiers at the Saskatchewan conference this summer did express their concern that the officials not get too far along the road before there was another opportunity for the Ministers to review the procedure. So it might be more procedural than substantive.

DEAN LEDERMAN: I picked up somewhere in the Globe and Mail a statement out of Ottawa that Ottawa was just about ready to make proposals to the

provinces about off-shore mineral rights, and there is another quite specific item that can be isolated.

THE CHAIRMAN: That is another one.

PROF. McWHINNEY: How did the public issue come in? Is it that the Quebec papers have suggested it is a repetition of the televised thing of last February?

I can see a case for a Dominion-provincial conference on fiscal and related matters, but should it not normally follow the procedure of being closed, as in the past?

THE CHAIRMAN: Shall we have a brief break for coffee, and we will come back to that point after the coffee.

DR. FORSEY: The only other thing that might have some urgency and might be something arising out of all the recent hullabaloo in Quebec, is in relation to the Bill of Rights. There might be some urgency about that.

--- Short recess

THE CHAIRMAN: Ted had raised another point just before we broke off for coffee, that we have also been pondering, that is the public aspect of this process.

As I mentioned, when we met as officials naturally the press was very much at our heels; and just before the last meeting a story appeared in the Globe and Mail with an Ottawa date line about the

work of the officials and this and that. We took the position in the meeting once again that the role of the officials was to advise their governments and carry out the instructions in that meeting, and that we were not in the public education or publicity business, desirable as those objectives might be.

Now the question is, again, whether the plenary conference will be in public. My own sense is that the public would demand^{it,} as it were, now, and that therefore we should be thinking of the kind of consequences of that.

PROF. McWHINNEY: I have a feeling that the Prime Minister's personal staff also would like it to be public, for reasons not especially related to constitutional. He is a good P.R. man, and it is silly not to capitalize on the political advantage. This may not, however, be Mr. Robarts' view. He ought to press his own position.

PROF. CREIGHTON: The Province of Ontario has a large responsibility itself for the building up of this conference.

DEAN LEDERMAN: Mr. Chairman, I think, going back, both the Confederation of Tomorrow Conference and the Federal-Provincial Conference in Ottawa in February did raise public expectations about publicity, and I think they want to see this cast on television again, and I don't think they can be denied. I believe this is a good thing, and

I think Mr. Robarts' basic instinct about the Confederation of Tomorrow Conference was right.

Someone, whom I shall not name, who has been at a lot of the closed conferences over the years, said that he thought that the open conference went better than many of the closed ones did.

The problem is how you move this discussion into the public domain. I don't think you can say to the public: "Well now, there is a committee of senior officials sitting on these issues and, of course, while it is in their hands, it has to be secret because they are not politically responsible people. So therefore for X number of months there are not going to be any public pronouncements or there is not much leadership from the government on the discussion of these things".

I think probably the position the senior civil servants are taking about their particular discussions in Ottawa is correct, but I feel, along with this, that having aroused these expectations that discussions are in the public domain now, there ought to be some parliamentary steps taken. Perhaps one ought to look again at whether there ought not to be all-party legislative committees in Ottawa and the provinces that have some discussions and have some hearings.

PROF. BRADY: When you say, Bill, that it is now in the public domain and should remain there,

do you mean all kinds of discussions?

I can see that some discussions at federal-provincial conferences may be very usefully held in public, and other discussions much more usefully in private, in camera. Surely you do not go the whole hog and have every kind of discussion between the various governments in public.

DEAN LEDERMAN: Oh, no. I entirely agree with you, Alec, that there have to be many secret, private discussions, and I am not perhaps making myself clear.

Somehow something genuinely bona fide has to be done to satisfy the public expectation that has been aroused, that there will be a continuing discussion in the public domain, to which governments will give some leadership.

Now, I am not saying that they lay all their cards on the table all the time in public, but what occurs to me is that you cannot now, having aroused those expectations, you cannot now have a long period of secrecy.

PROF. McWHINNEY: If you say - and I am sure your judgment is correct here, Bill, that in politically realistic terms one cannot avoid having a public conference of some sort - I suppose really one has to consider perhaps two types of conference.

Maybe there is a case for what I would call a workman-like, private conference of the

traditional Dominion-provincial ones to consider tax agreements and that sort of thing that really need to be discussed privately; and then one has to plan, presumably, an innocuous agenda or one that anyway lends itself to the public domain, for the public session.

I think the comments on the Confederation of Tomorrow Conference about the new things that emerged, really went to the good behaviour of political figures and factors of this kind. It was not so much that particular agreement was achieved on concrete results as that before the television camera there was a more determined effort to be polite and accommodating.

DEAN LEDERMAN: I was thinking of the factor - you remember when Mr. Pearson called the famous coffee break in Ottawa and there was a secret session. One secret session occurred after the coffee break, and as I recall the discussion - and I think it is proper to recall it within these four walls because it was a secret session - Mr. Pearson took the position that "we will have to go back into public session this afternoon. If we do not, the public will be saying, the press will be saying: 'What are they up to? Something is wrong'."

So the business of, I suppose, future federal-provincial conferences of heads of government are going to have to be partly public and partly private.

The business of how you put these two things together is going to be very delicate. That was certainly his feeling at that moment, that you would not dare close the rest of that conference, and nobody demurred, as I recall it.

THE CHAIRMAN: What is the practice in other situations? I was thinking about this, for example, after I took the very strong and traditional view about the privacy of the official or civil servant, that, my goodness, you have in GATT negotiations or the U.N., you have civil servants front and centre debating and arguing and interpreting; and in those organizations, of course, at the political level you have the same thing.

Are there differences between the international scene and the domestic scene, such as to make the character of the exercise a different one?

PROF. McWHINNEY: There are hypotheses formulated, for example (I suppose irrelevant here) in relation to the proceedings of the U.N. Certainly those that get a great concentration of the communication media are considered to decline proportionately in terms of concrete or really useful results. This is the basic criticism made, for example, of the U.N. General Assembly, but the more specialist committees, even though open, do not really have a publicity media coming in and the speeches are shorter and directed more to immediate issues.

I think there is a clear difference in the nature of the things you discuss and the way you discuss them, according to whether the thing is public or private.

MR. PERRY: Mr. Chairman, what issues specifically are we debating, that we advise Mr. Robarts not to go to this conference or ask for a postponement, or just what is it we are talking about?

PROF. McWHINNEY: Whether it is public or private.

MR. PERRY: I think if a conference is called he must go.

PROF. McWHINNEY: He is asking for advice, is he not, whether it should be private or public?

THE CHAIRMAN: I am interested in two points. One is the timing of such conference and the desirability of having it on this subject sooner or later; secondly, trying to anticipate what some of the implications might be of a public meeting in terms of the kind of preparation that should be done for it, and in terms of the kind of agenda it should have. You know, a number of Premiers write back and say, for whatever reason, real or invented, that this is not an appropriate time and may not take place at that time.

MR. PERRY: It could be postponed for a

short period or something.

THE CHAIRMAN: As I say, yes, for this purpose it is merely being proposed but not ---

PROF. SYMONS: Has a tentative or a specific date been suggested yet?

THE CHAIRMAN: No, a very loose suggestion.

DEAN LEDERMAN: All Mr. Trudeau has said, as reported in the paper, was late November or early December, with the heads of government.

DR. FORSEY: I think we have to be quite clear about Dominion-Provincial conferences and a conference on this constitutional matter. There may be all sorts of reasons, as you suggested, for having a Dominion-Provincial conference considering a variety of things. It also seems to me quite possible that at such a conference it might be necessary to take up certain aspects of this. For example, you may get an absolutely critical situation about minority rights in education in Quebec and minority rights of education in other parts of the country, and it might make the whole question of Bill of Rights a rather urgent matter for further discussion at the ministerial level.

On the other hand, it does seem to me that a full-dress resumption of the Conference of last February looks a little premature, until the Continuing Committee of Officials has got rather

farther than I gather it has got yet or is likely to have got by December.

If, on the other hand, the Continuing Committee of Officials has something fairly concrete on some specific thing, it might be worth while having that discussed; but the idea of a full-dress resumption of the Banff Conference in December does strike me as perhaps a little premature.

PROF. SYMONS: I share that view too, Mr. Chairman. I think that unless there are a number of things in which there has been substantial agreement and accepted background research from the point of view of the participants, it really could be unhelpful to have a full-dress conference during the rest of this year.

PROF. CREIGHTON: I agree, Mr. Chairman. It seems to me when this last conference was held there was a good deal of very enthusiastic popular expectation and that there was definite progress towards what we all believed was going to be a bilingual Canada.

Now circumstances have completely altered, and we are faced with another thing, a certain factor of a unilingual Quebec. That, I think, has dampened peoples' enthusiasm for this bilingual thing very considerably indeed, and, I would think it, therefore, foolish on the grounds of the public attitude.

I think we have spent enough time on this. Why not get to No. 5 here which seems to me to be the nub of this particular meeting, although I don't want to rush people ahead.

THE CHAIRMAN: What is your feeling? Items 2 and 3, which are administrative, procedural, I think I would prefer to leave them to the end of the agenda so that we do not foreshorten the main business, because we have very brief reports on those two. What is your wish? Are you ready to go on now to the propositions? I think we have had quite a good general discussion.

PROF. MEISEL: Mr. Chairman, I think we should still think about one or two items that have been raised earlier, but which have not been fully discussed.

I detect a certain hysterical tendency on the part of some of the comments that have been made as the result of both the St. Leonard incident and the Tremblay speech in the press. I think these are serious developments, but I think they should be put within their context, and I think it would be very foolish if the work of this Committee or of the Government of Ontario were to change its course every time, you know, a local school board in Quebec makes a decision under certain conditions, every time a politician (even a Minister) makes a speech. I think these things happen on both sides, and I think

it would be very foolish now for us to allow ourselves to be stampeded by certain events we may not like into altering fundamentally a course of action which I think this Committee and the Ontario Government have adopted and which can only be tested over a long period of time.

I for one react to things like the St. Leonard affair and the Tremblay speech the way I do to the Russian invasion of Czechoslovakia. I sort of go wild and spit and shout and scream. Then I sit back and think about it for a while, and all the things that as a political scientist I have learned about behaviour of nations and groups come back to me and I realize maybe I should calm down and take a broader perspective.

I think this is a useful thing to think about these developments, but I do not think the situation has changed, for example, to the extent that Professor Creighton has suggested, that there is any attempt in Quebec to make Quebec a unilingual province.

PROF. BRADY: I think, Mr. Chairman, the Prime Minister of this province seems to agree with Professor Meisel that what has occurred in Quebec recently really does not alter Ontario's position, and should not.

Even Mr. Tremblay's remarks, there is nothing very new about them, and I do not think we should get

too excited about it.

It should be observed, of course, in the course of events in Quebec in the next year; it ought to be followed, naturally. There is great conflict of opinion in Quebec. I think we recognized that from the beginning a few years ago.

There may be a conflict of opinion within Mr. Johnston's government. I suspect that in his absence there has been a tussle, as it were, between some individuals in the government.

However, I do not think we should dwell too much on these incidents, magnify them out of proportion.

I was a little surprised at my friend Ted McWhinney's comments. He seemed to get unduly excited by what he discovered in Montreal on his return from South America.

PROF. McWHINNEY: I wasn't excited. I received it pretty calmly, I thought.

PROF. BRADY: So far as our job is concerned and the policy of Ontario is concerned, I do not think anything has happened, as it were, to alter things.

DR. FORSEY: I thought someone said, with fair measure of agreement around this board, that the Ontario Government were doing what they thought was right and should get right on doing what they thought was right. If I gave the impression to

Professor Meisel that I was getting wildly excited about this, I did not intend to. I merely remarked that it is possible that when a Dominion-Provincial Conference comes around, by that time the Quebec language bill, whatever it is going to contain, may have been brought up, and by that time various things may have happened. It may be that the Government of Canada will consider that certain developments have taken place in other provinces already, perhaps by way of reaction, which make the question of a Bill of Rights rather more urgent and one that perhaps should not await a more distant resumption, or full-dress resumption, of the February conference.

I do not think that is an unreasonable proposition to make. I do not think we should be stampeded. I do not think the Committee or the Ontario Government should lose sight of the rights and wrongs of the situation or should be rushed into something foolish by Mr. Tremblay's speech or by the St. Leonard business. I took a rather more serious view of the St. Leonard business perhaps than John Meisel, but I think we have to keep it in perspective.

I am a little surprised that anyone has the impression from certainly anything Professor McWhinney or I said, that there was a note of hysteria about it.

PROF. CREIGHTON: Professor Meisel on his own confession is accustomed to scream and spit,

I gather (laughter) but what we were talking about was the popular expectation of a public discussion, and that is what I was discussing.

PROF. McWHINNEY: Actually, I suppose I should join Eugene at this particular point. I raised the issue as to whether Ontario policies were typical of national policies or other provincial policies. I certainly agree with what I thought was Eugene's position and I am sure is the position of the whole Committee, that the Premier does what he considers right in the provincial context, and he does it because he thinks it is so; and whatever the national policies are, he will go ahead and do it.

I think this is a valid point, but I also feel - and perhaps this point is not fully appreciated in this province where one is more in the pragmatic, empirical common-law position, one does discuss philosophical objectives in Quebec.

At the moment what is very interesting is the sort of honeymoon period that many people felt would follow this very decisive defeat of the Conservatives in Quebec, and which many people expected would last - notwithstanding some very ingenious University of Montreal attempts to show that Mr. Trudeau was elected in Quebec by English-speaking people (absurd); but the learned reasons are wrong. The honeymoon period for Mr. Trudeau

seems to be over, and it is quite interesting.

THE CHAIRMAN: It is quite interesting for a bachelor to be in a honeymoon period.
(laughter)

PROF. MEISEL: Mr. Chairman, all I really wanted to say was that I think we should take the long-run and long-term perspective on these things.

It seems to me that each of these events, of course, becomes part of historical development and has to be regarded in its historical context.

For instance, I think Professor Creighton said earlier that Quebec was going to become a unilingual province. Well, Ontario is a unilingual province. Ontario has not, for instance, yet gone as far as the B and B Commission suggested.

I do not think we should allow ourselves to change our course of action because certain events happen that seem to be a step backwards. In a very complicated and messy kind of series of negotiations and accommodations that two ethnic groups of this magnitude engage in, you will get difficulties and you will get defeats.

I think the perspective of the statesmen in this kind of thing is to consider the long-term goal and work towards it, and to be prepared from time to time to re-assess the situation, look at what has happened, and at the same time not change course every time you get defeated or you think

something happened that is not going to further your ultimate goals.

In relation to the specific issue that you raise, whether there should or should not be a conference late in November or early December, I think there are implications that follow from the position that I advocate here.

I think that while there may be some things that should not be discussed because we are not ready, because the participants are not ready and the Ontario Government could advise against the discussion of certain topics or the holding of a certain type of conference, there are on the other hand things that should be discussed.

It seems to me that you mentioned earlier that one of the motives for holding this conference this year was that it was felt by some people that there are expectations which should be met; that Canadians have come to expect something to happen this year and therefore something should happen.

Well, in certain areas certain things could happen. For instance, it may be that Professor Forsey's position on this, or what I take to be his position, is right, that there is a greater urgency now to consider individual rights; but there may be other areas in the field under discussion where the more limited type of conference might be held so that people do realize that although there may be some

deepening friction over certain issues, there is a certain accommodation and agreement on other issues. I think the conference could be useful in this context.

DR. FORSEY: If you get to that situation where there is agreement over some issues, it might be highly useful, yes. I rather suspected that the Continuing Committee of Officials had not got very far on anything of this sort. If it can say: "On this and this we have already reached some agreement now, and we would like to have this come before the plenary session of the Premiers and Prime Ministers", fine; there is no possible objection to that.

Incidentally, when Professor Meisel makes a remark that Ontario is a unilingual province and seems to imply therefore that there is nothing too disquieting about certain things happening in Quebec, I think it is worth reminding ourselves that what counts is not only the direction in which you are moving. Ontario has been a unilingual province but it seems to be in the process of moving towards bilingual; Quebec, on the other hand, has been officially a bilingual province, and there are some indications that it may be moving in the direction of making it unilingual. It is a little early to say, perhaps, but there are some indications that it might.

I think that is a factor that has to be taken into account in the judicious weighing of everything which, I quite agree with John Meisel, is necessary.

THE CHAIRMAN: Well, John, you mentioned historical perspective, so perhaps we should turn to the British North America Act and get on to the propositions.

The first set were the ones which went out earlier in the summer, and in which we had some brief discussion or consideration at the Committee of Officials. I would like to go through all of these today and get some feelings from you of the totality.

The first one, this is the one which has been written in:

"The British North America Act should be examined in order to decide whether it should be amended or re-written."

I think you will see, if you have the same copy that I have, the handwritten amendment, that some revision in thinking took place there, which in fact emanated from the Prime Minister, with the one saying that it should be examined and the other "with a view to being re-written". The other was that it should be examined to decide, in effect, whether it served, whether it could be amended without re-written. Are there any comments on that one?

PROF. McWHINNEY: By the way, is this first part really directed as much to the principle of grammar and style as to substantial issues?

THE CHAIRMAN: No, I am really thinking of substance. If the grammar affects the substance, we should know it.

PROF. McWHINNEY: I was discussing a similar proposition in Asia, where I was advising a government on whether its constitution, which was first written in English and then later translated into the national language, should be re-written.

There were many criticisms that the local language translated from the English was inelegant, and was the very thing that persons objected to. In the end, the government's conclusion was that the substantive problems were all more ---

PROF. CREIGHTON: Local language here is English.

PROF. McWHINNEY: Local language there was Japanese.

PROF. CREIGHTON: It is not surely relevant.

PROF. McWHINNEY: I was going to say, if it is basically directed to grammar and style, local constitutional experience is it is something you have to put up with.

THE CHAIRMAN: I think we are thinking of the content.

DR. FORSEY: The original heading, to which I think I took strong objection on the same lines as the Premier, the original wording of the heading suggested that the main decision had been taken: that it was *res judicata*.

We could start from scratch, start from zero and say: "I think what is here now is out of date" and you ask whether you need to throw the whole thing out of the window and start with a blank sheet, or whether you can say: "What is wrong with this thing and what needs to be changed?".

I think this is a much more judicious formulation.

Incidentally, when you come down to paragraph 3 of the explanation, I feel a certain uneasiness about this. I do not remember seeing this thing before, by the way. If so, it escaped my notice.

"... the present fundamental law of

"Canada consists of a variety of English

"statutes ..."

I don't know exactly what that means or how many there are. I should have thought the number of English statutes, apart from the British North America Act, which could be described as part of the fundamental law of Canada, would be pretty limited.

I appeal to those learned in the law.

When it comes to conventions, I can only say

that I do not accept the view that the conventions of the constitution are part of the fundamental law at all. I think this is a very loose use of the term, to describe conventions of the constitution as part of the fundamental law. They would not be enforced by any court; judicial notice would not be taken by any court.

For example, such a question as whether after the defeat of that tax bill last February the Government should have resigned or asked for dissolution of Parliament. If you had brought that to court, the court would have said, "I beg your pardon?" about fifteen times, finally ending up by saying: "Go and chase yourself".

The conventions surely are an immense part of the working constitution, but they are not part of the fundamental law. I am a little uneasy lest there should be some idea in somebody's mind here of trying to put them into a constitutional document as part of fundamental law. This, it seems to me, would be a very drastic alteration in our whole constitutional arrangement, and it might have very unfortunate consequences.

One of the great values of the conventions is that they are highly flexible and can be changed to respond to new situations. If you go shoving it all down into an Act of Parliament - or more than an Act of Parliament - which can be changed only by

consent, perhaps, of all the provinces, heaven help us.

PROF. CONWAY: I wonder, Mr. Chairman, if Dean Lederman would give us a definition of fundamental law.

THE CHAIRMAN: I was going to ask that. It would be helpful.

DEAN LEDERMAN: This is ---

THE CHAIRMAN: Fundamentally difficult!

DEAN LEDERMAN: It is not an easy thing to do in a few words. The first thing I would say is that you could start with a definition of public law; that this is a body of law, whatever form it takes (statute, constitution, convention or whatever) which defines all the office holders of the main institutions of the state, what their powers are, what procedure they must follow to exercise their powers; how they get their offices, how they are removed and so on.

I think Sir Ivor Jennings' definition is that the fundamental constitutional law of a country is that which sets out all the essential features of the main institutions of government.

PROF. CONWAY: Would you include conventions within the term then?

DEAN LEDERMAN: I would. Perhaps I differ from Dr. Forsey on this point. I would include conventions in the term; or whether they are

justiceable in court or not is not the test of whether they are constitutional or fundamental.

PROF. McWHINNEY: You are using the English, not American, isn't that the key to it?

DEAN LEDERMAN: I don't think it is that simple.

PROF. McWHINNEY: Dr. Forsey is giving the American definition, where it is a technical term of art that is presumably paramount, some sort of supra normal constitutional law.

DR. FORSEY: In the context, with great respect, it seems to me this is what you have to do; because you are talking here about the British North America Act, that is the heading.

When you come down to No. 3:

"In addition to the B.N.A. Act the

"present fundamental law of Canada ..."

surely this implies that we have at present in the British North America Act something roughly the equivalent of the American written constitution; there is the fundamental law.

In Great Britain where you have not got a constitution in the American sense or West German sense or in the Indian sense or a variety of others, it is a different matter; but it seems to me that if you are talking about fundamental law, you must perforce, in our federal context, in Canada, think of it in the sense in which the Americans think of

the fundamental law, and if you are not going to think of it that way you had better make it clear.

The thing that worries me is the idea of putting this in a written document, changeable only by very special process.

DEAN LEDERMAN: The point I would really like to make and can make rather briefly, is this, that your test of what is fundamental law can be substantial, that is, the subject matter. To me the Election Act expresses the principle of universal suffrage, the Election Act of the Federal Government. This ordinary statute of Parliament is just as fundamental as the distribution of powers.

PROF. BRADY: Supreme Court Act.

DEAN LEDERMAN: Supreme Court Act.
If I can finish what I am trying to say, that is a substantial test of what is fundamental. As Jennings says, the main institutions of government - a definition of who they are, how they work, how you can put them in office and get them out of office.

PROF. BRADY: Sometimes these are called organic laws of the constitution.

DEAN LEDERMAN: Yes. The other test of being fundamental is how you can change it. The sense of fundamental law is often used in the sense used to designate things that are deemed to be beyond the reach of the ordinary majority, ordinary parliamentary vote, and you need an extraordinary

amending process -- three-quarters majority or two-thirds majority, something of this kind.

These two senses tend to get mixed up. There is a tendency to take the most important things in a constitution and entrench it behind one of these special majority requirements, so that the two things tend to run together; but the two senses of fundamental and not fundamental, as far as a Federal constitution is concerned, the one thing that is absolutely fundamental is the distribution of power. I do not think you dare have that as subject to ordinary legislative processes. I think it must be written, and it has to be subject only to the special, constitutional, amending authority.

If you are going to have fundamental individual or group rights, upon which the cohesion of the country depends, these are in the same category.

You must, in my opinion, have an impartial, independent tribunal who has the last word in the interpretative sense on the distribution of powers and, if you have a fundamental Bill of Rights, on the fundamental Bill of Rights, and that has to be specially entrenched; but in the amending process itself, of course, there ought to be an extraordinary amending process. I think there we come to the end of what absolutely has to be written and

subjected to special procedure.

DR. FORSEY: Yes, I should be glad to hear more, but what was worrying me was the hauling of conventions in here, I think conventions in the basic sense, in talking about re-writing or amending the British North America Act. They are not specifically stated as such.

"The B.N.A. Act itself does not deal
"with many important aspects of our
"system of government."

Of course it doesn't, and to my mind it should not.

What I am afraid is that somebody imperfectly acquainted with the way our present system of government works - and, heaven knows there are enough people who are and have been highly educated and widely touted as constitutional authorities, I might add - people unacquainted with our government arrangements or system of government might get a notion from this that the Continuing Committee of the plenary conference was going to write into the British North America Act or new constitution, whatever you call it, responsible government, the whole business of responsible government; write in the constitution of the Cabinet, which you cannot find now either in the British North America Act or in fact in any statute. The Privy Council is there, yes, and individual Ministers are there, and so are the Senate, House of Commons. I don't think

there is anything in statute which refers to the Government, the administration or the Cabinet.

Are you going to try and write all these things? Are you going to try and write into something equivalent to the British North America Act all the rules that deal, for example, with the representative character of the Cabinet? Are you going to write in some requirement that, subject to certain conditions which would have to be stated with extreme precision, all provinces shall have at least one - except Prince Edward Island - must have at least one member in the Cabinet?

Are you going to write in that subject to certain conditions, in other words, whether there is anybody who has been elected, let us say, there must be at least one representative of French-speaking Canadians outside of Quebec in the Cabinet?.

Are you going to write in that, subject to the results of the election, there must be so many members from Ontario or so many members from Quebec in the Cabinet?

There are millions of these things of these things of immense importance, but if you try to write them into a document which can only be changed by some special amending process, you are going to get yourself into a dog's breakfast.

DEAN LEDERMAN: I think Dr. Forsey's point is well taken, that the part of the fundamental

law of Canada or the constitutional law of Canada that you want written in especially entrenched document, is one thing; the total of the constitution is another. I think the two are being confused in point 3 here. I think point 3 is taking too wide a sweep. I tried to indicate a few minutes ago things which must be basically written in a fundamental document, but you do not need necessarily go beyond these.

There are all kinds of conventions of the American constitution too. You by no means find the whole story of American government within the four corners of that document.

PROFESSOR BRADY: That applies to any constitution. I agree with Eugene on this matter, that it is desirable to separate the laws from the conventions. I mean, we have a federal situation and we also have British parliamentary system and we have very significant conventions. There is just one difference perhaps (there may not be much difference between us). The British North America Act is not quite like the American constitution.

DR. FORSEY: No.

PROF. BRADY: I think we have, in addition to the British North America Act, other statutes. There are Canadian statutes, statutes of the national Parliament that are significant to

the constitution. They may be called fundamental laws or organic laws and so on. The term "organic laws" I think is a pretty general one in political science. We have two series, I am sure, reference to that are significant with/the working of a constitution. We have them and we have the conventions, and the conventions certainly are different. I thought the basic point about Dicey was that he distinguished between the law and conventions. That is part of Dicey that has survived as far as I am aware. So that I think the distinctions are to be recognized in any statement of this kind.

DEAN LEDERMAN: Mr. Chairman, I may be mis-reading this paragraph, but I was under the impression that the idea here was that there are certain conventions which are so important and are of a nature that suggest they ought to be moved from the realm of convention into the realm of organic law, as this proposed Electoral Act.

PROF. McWHINNEY: I hope not. I thought this was intended to be purely descriptive. If, as Eugene points out, the intention of this American, continental system was to bring in the natural undertones that come with it, the term ought to be stricken and some simple term like "the constitutional law of Canada includes" would be much better.

is the
 If it/drafters' intention to be making
 some of these conventions fundamental law, it is
 a different matter; but I assume whoever drafted
 this intended it as a descriptive term and there
 was no hidden, abnormal development in this
 situation.

DR. FORSEY: It is quite possible
 that some conventions have got to a state where it
 would be desirable to put them into law, and into
 fundamental law in the American sense. I don't
 know. I suggest it is a point worth discussing.
 What I wanted to emphasize was the danger of
 sweeping statements like this which imply that you
 were trying to squash into some sacrosanct document,
 changed only by a process of great difficulty, a
 lot of things which you don't want in there. You
 want to be able to change it fairly easily. You
 want to be able to expand or contract the size of
 the Cabinet without going to shop around for the
 consent of all governments in Canada. You want
 to be able to adapt the conventions of responsible
 government - what requires the resignation of the
 government, what requires a fresh election - to
 the situation that may arise. You don't want
 to freeze some possibly out of date conception
 in a document which is very difficult to change.
 It is really in the context of amending or re-
 writing the British North America Act, re-writing

the constitution, that this wholesale squashing of the conventions, I think, is a dangerous thing.

DEAN LEDERMAN: There is an implication that the B. N. A. Act is at fault because it does not tell the whole story now, and therefore, in amending or re-writing you are going to try and get it all into one document, and I entirely agree.

DR. FORSEY: All the books in the world would not contain it.

THE CHAIRMAN: I am pleased this has come up, because far from being detail at all, it is an essential matter, the more so since I had a feeling (and it is no more than that) that we are going to see in our discussions a very heavy shift in the federal government's direction in this matter, and we want to be well clear as to where we stand on this point.

PROF. McWHINLEY: You think there will be a shift in favour of this American fundamental law?

THE CHAIRMAN: Yes, I use a word no stronger than "feeling", my intuition, as it were, but by what we have seen so far I think the shift of direction is going to be marked.

DEAN LEDERMAN: To give a specific instance, I mentioned the Election Act. I think the Election Act should be left as an ordinary statute in Canada and the provinces; but if you

are going to write a specially entrenched Bill of Rights, I think one of the first things that ought to be in it is the right to vote.

DR. FORSEY: You do not want to write a new Election Act into something which can only be changed if Prince Edward Island agrees.

DEAN LEDERMAN: There are all kinds of detail. For one thing, you have to classify people in mental institutions, why they are there, whether they have lost their vote or not, and people in penitentiaries. There are all kinds of problems.

MR. GREATHED: Judges too.

DEAN LEDERMAN: There are all kinds of details that you want to leave to ordinary process, but the main right to adult suffrage is one of the principal aims in the federal proposal.

THE CHAIRMAN: I am glad this has come up in this way, because I think we will have to come to you on this of necessity.

DR. FORSEY: May I raise a purely linguistic point I raised in comments in the Secretariat? On page 2 of this one headed "3", paragraph 5:

"A constitution should be a living vital
"document"

What exactly does that mean? I don't know.

PROF. CREIGHTON: Does it mean you are to

have one like the French and change it every once in a while, every generation, or to have one like the Americans? I think this is excess. I don't know what he means.

PROF. McWHINNEY: This sounds like Chief Justice Marshall.

PROF. CREIGHTON: It appears to assume that the constitution we have is not a living and vital document, apparently and presumably on account of its age; you must change it, you need to vitalize it, re-energize it, and you can only do it by re-writing it all over again.

PROF. McWHINNEY: I think it confirms Eugene's feeling that one was stressing this fundamental law, natural law, civil law American approach rather than the English and common law approach.

DEAN LEDERMAN: This same assumption of completeness lies behind 5 as of 3.

PROF. McWHINNEY: Same philosophy really.

PROF. CREIGHTON: You say that is the philosophy the Federal Government is adopting in your provincial proposition here.

PROF. McWHINNEY: I think perhaps you had better be duller in this preliminary document. Some of the euphoria is definitely present in 3 and 5.

PROF. BRADY: You might simply say

"a document that reflects the aspirations and hopes of the nation's citizens".

PROF. McWHINNEY: Basically I can appreciate Eugene's point. Really it seems to me you are getting into your constitutional fundamental law philosophy there. You can make the case that the constitution does not have to reflect the aspirations and hopes of the nation's citizens as a perfectly tradesmanlike document.

PROF. BRADY: You can take it for granted.

PROF. CONWAY: We have been sitting here for three years now because it is generally assumed by a large number of Canadians that there is something not quite right with the constitution. If we are to assume that the present constitution reflects the aspirations and hopes of the nation's citizens and so on, then I should think our business is pretty well done, and the constitution is satisfactory. It is only on the assumption that in some way the constitution is unsatisfactory that this Committee comes to continue at all.

DR. FORSEY: Yes, but the question that really arises, it seems to me (I didn't realize how objectionable these two words could be), the question arises whether you can really get into a constitution quite as much as this - a constitution that reflects the aspirations and hopes of the nation's citizens. Surely every document of manageable size and workable

kind is going to leave an awful lot of things out; besides which, the aspirations and hopes of the nation's citizens will change much faster than you are likely to get the federal constitution to change.

What are the aspirations and hopes of the nation's citizens? If you were to ask the people who interrupt Bissell's speech, you will get a different answer than you will get from Professor Creighton or myself.

PROF. BRADY: The main thing about this, it is so general.

DR. FORSEY: It is terribly inconclusive.

PROF. BRADY: "Continues to reflect the hope and aspirations ..." that is a sort of eternal statement. Any constitution, I suppose, does that.

MR. GATHERCOLE: If somebody wants to have a new dress on it, why shouldn't they be permitted to take a hand in it?

THE CHAIRMAN: A mini dress. Just standing back from this whole proposition, there are two questions, are there not, that have to be faced. One is, if we look at the language of the proposition: "... should be examined in order to decide whether it should be amended or re-written", one question is: Are there elements of the British North America Act that need tidying up or adaptation, I

suppose.

There is the other broader question underlying this, and that is what kind of constitutional system are we going to follow?

MR. GATHERCOLE: Right.

THE CHAIRMAN: And I think these are related but separate questions, isn't this true?

MR. PERRY: I would say in view of the original proposition, the most vital and living paragraph in this whole thing is No. 4.

"...general review of our constitutional
"arrangements may lead to significant
"changes in the constitution .. may
"even involve the writing of a wholly
"new document."

I am all for that, but I doubt if everyone here is from the remarks that have been made.

DR. FORSEY: I don't think so. Surely, I suppose I am the one who raises the last wail of the expiring Tory party in this Committee, and I am the old stick-in-the-mud, but I cannot see anything wrong with No. 4. You examine the thing, discuss the structure and operation of the system. When you have done it, it may involve extensive re-writing and may even involve writing a wholly new document. I rather doubt whether it will, but I should think anybody, even such a crusty old mothball as myself, ought to be willing to accept

that point. You examine it, and if you are convinced you say "all right, extensive re-writing. Yes, the whole thing should go out of the window." It is essentially just an invitation to approve of all things, to hold fast to that which is good.

PROF. McWHINNEY: There is a sophisticated point of constitutional drafting involved, and it is important to remember the issue is really whether you want a somewhat more fundamental approach that emphasizes the working arrangements, which, essentially, for better or for worse, has been the common law approach; or whether you want the European approach, as Donald said about France.

I have been advising an Asian government on whether they have a new constitution, and one of the examples taken, and one which is always set up, is Israel, a very viable constitutional system, but they do not have a written constitution. They simply felt they did not have time to draft a constitution, so they concentrated on getting important statutes adopted.

Now, it seems to me Eugene made a point which I think has a great deal to be said for it, and perhaps it is a mistake in the opening gambit here to seem to commit ones self if this is what the language lends itself to, towards a continental style, poetic, constitution, unless that is what one wants to do. I take it essentially the

B.N.A. Act has been a functional constitution. This is the reason why it is fairly dull in terms of language and drafting. However, I think these antipodal points in constitutional drafting ought to be noted, and I judge that is what our discussion was directed to. It is not opposition to the issue of change.

DEAN LEDERMAN: My point is whatever is to be in the document, whether a revised B.N.A. Act or it gets a new name, or whatever goes into the document is going to be necessarily highly selective, and there are going to be a great many other governmental things that will have to live and exist outside of it; and 3 makes what we think is then an unwarranted assumption that you can get more into the document than you possibly can. I think this is really a basic objection to some of the descriptions here.

DR. FORSEY: I would be inclined to suggest that this final paragraph which has, I think, some point and merit to it, might be shortened a little bit (which is always an improvement in anything) to something like this:

"The constitution should reflect the
 "basic hopes and aspirations which should
 "help to educate them to their rights
 "and responsibilities, and should help
 "to contribute to a sense of national

"achievement and identity."

I think there is something in that all right, without going so far as to adopt a poetic document, as Mr. McWhinney happily puts it. I think there is some reason to say that it should reflect certain of the hopes and aspirations, but you cannot take them all.

Take the business about the right to vote which Bill Lederman mentioned. Surely this is the kind of thing that a constitution should embody. There are certain basic hopes, basic aspirations, basic beliefs which it should contain; but here it is a bit too glossy. My hopes and aspirations may be into Paradise.

THE CHAIRMAN: I think Tom Symons has been trying to get a word in.

PROF. SYMONS: Mr. Chairman, I just wanted to have a clarification. In addition to the documents that were tabled with us this morning, will we be looking at the documents which Mr. Posen circulated to us at the end of the month?

THE CHAIRMAN: Yes.

PROF. SYMONS: Where the question of preamble to the constitution comes up?

THE CHAIRMAN: Yes.

PROF. SYMONS: I wondered if our discussion at this point would not be particularly helpful there.

THE CHAIRMAN: I think that should be

carried over there. Are there any other points,
or may we go on? I think we understand the
issue here now.

Proposition 2.

"Canada should be a federal state".

MR. PERRY: I think it should suggest
it continue to be a federal state.

DR. FORSEY: About the last sentence
here of paragraph 2:

"These considerations have too often been
"neglected in Canadian governmental
"practice"

I am inclined to think that is a rather strong
statement.

THE CHAIRMAN: Mr. Perry makes a good
point suggesting it should read "Canada should
continue to be a federal state".

DR. FORSEY: Yes.

THE CHAIRMAN: We cannot claim to have
invented it.

MR. GATHERCOLE: Or restored.

MR. PERRY: Or "revert to".

DEAN LEDERMAN: "Continue" is the word.

DR. FORSEY: The statement at the end
of paragraph 2:

"These considerations have too often been
"neglected in Canadian governmental
"practice."

Seems to me to be somewhat tendentious, and possibly taking in a rather large amount of territory. I feel uneasy about it.

I am also worried about the last sentence in paragraph 5:

"No other government should acquire
"de facto jurisdiction by legislating
"in its stead."

I don't know how a government with a federal constitution can acquire de facto jurisdiction. Either it has jurisdiction or it hasn't.

PROF. McWHINNEY: You cannot mean that in an abstract, juridical sense. Until a thing is actually ruled on, in fact it is not unconstitutional; there is a presumption of constitutionality till the thing is challenged.

In an abstract sense, I suppose, in federal states, both sides of government are always asserting jurisdiction by legislation, until they are effectively stopped by judicial challenge, but as a matter of practice the problem might be different.

DR. FORSEY: I merely thought the words - the rest can have the consideration of the lawyers - whether it was an exact statement of the case. I was raising the question. I don't know. I do not feel competent to pronounce. I just felt uneasy about it.

THE CHAIRMAN: I think what it really means in simple words is that no government should go monkeying around with anyone else's jurisdiction.

DR. FORSEY: I think that has already been said, has it not?

DEAN LEDERMAN: Provided the jurisdictional lines are clear; but the most untrue thing that was ever said about any federal constitution was stated by Lord Atkin when he said you had watertight compartments. Our total experience at all levels in government indicates that there will be genuine twilight zones, but where governments may experiment with what they can do with statutes and see if the other fellow is going to stop them. This is part of life.

DR. FORSEY: It will ultimately have to be decided by the Courts.

PROF. McWHINNEY: If it is litigated.

DEAN LEDERMAN: You do not require squatters' rights. It seems to me it is rather suggested if someone was smart enough to get in first ---

PROF. McWHINNEY: I think a better statement, echoing the Chairman's thought, would be that the government, as an instrument of federal policy, should defer to the known legislative competence of other governments.

THE CHAIRMAN: As a matter of fact, we

have a subsequent proposition on that, do we not?

PROF. McWHINNEY: Alec seems to think it was stated in 4.

THE CHAIRMAN: Page 12.

PROF. BRADY: It is stated in 5 in the first sentence.

THE CHAIRMAN: It is elevated to a proposition of its own on page 12.

PROF. McWHINNEY: Yes. This, in terms of the label, is the principle of federal commity. Certainly I feel we should strike 5 then.

THE CHAIRMAN: It really doesn't belong here; it has a proper place of its own.

PROF. MEISEL: Mr. Chairman, this is a minor point, but in paragraph 1, the last penultimate sentence:

"Particularly since the 'quiet revolution'
"commenced in Quebec, the cultural
"diversity, especially between French
"and English speaking Canada, has become
"increasingly apparent."

I am not sure that is really correct. It may have been more noisy, but it has not be apparent, it seems to me.

PROF. SYMONS: would agree with that, Mr. Chairman. It is just not historically accurate.

PROF. MEISEL: It is a matter of

phrasing.

THE CHAIRMAN: I agree. Someone suggested to me the other day that we should read history books instead of newspapers and we might have a better view of things.

PROF. SYMONS: In the same paragraph, Mr. Chairman, I just wonder about the assumption in the sentence that the creation of new provinces has accentuated regional diversities. That is a pretty sweeping statement, and I am not sure it is correct. At any rate, I would like to see it thought about.

THE CHAIRMAN: That may have been a re-phrase of "regional disparities".

PROF. MEISEL: I think that needs to be re-drafted.

PROF. SYMONS: I do too.

PROF. CONWAY: In the second to last sentence in paragraph 1:

"The problem has become increasingly

"dangerous"

The principle of cultural diversity was recognized in 1867, but it has happened since the quiet revolution that it has become explosive.

DR. FORSEY: You wouldn't say dangerous, though.

PROF. CONWAY: I wouldn't say it. I think that was the intent.

PROF. MEISEL: I don't think we can substitute. I think we should point to weaknesses and perhaps possibly have another look at this, but I don't think we can re-draft these sections. What we can do is point to places where it could be improved.

THE CHAIRMAN: That is what we are really looking for, where these can be improved. Are there any other matters on that one?

MR. GATHERCOLE: Mr. Chairman, just speaking a little bit in general, running through there is a common thread of the observations here, the idea of great regional diversity; and no doubt this has applied in fact, but I think in giving so much pronouncement respecting regional diversity, you want to ensure you wind up with something that has some homogeneity to it; and also doesn't place so much emphasis on diversity and equality that it reduces the possibilities of making Canada a continuing well-to-do nation and one more prosperous and with greater well-being in the future than now.

I just have a feeling, on reading some of these things, that we are trying to bend over backwards in making allowances for diversity, and in the end all you are going to have is a hodge-podge of arrangements, with also equality of means of production, which may in the end result in a much

slower rate of economic growth than otherwise would be realizable. I just make that observation.

THE CHAIRMAN: I see your point.

PROF. CONWAY: I think though, Mr. Chairman, you must be careful not to think of this purely in terms of English and French Canada. When I was on the west coast last March a friend whom I have known a good many years told me that he considered himself to be a British Columbian first and a Canadian second, and he is intelligent and highly educated man.

I think back here at the centre of things in Montreal, Ottawa, Toronto, we tend to forget how strong that emotion is out there.

I think we have to bear in mind this regional diversity which really has become much stronger since places like British Columbia lost its former character and is looking north and south a great deal.

PROF. BRADY: And west.

PROF. CONWAY: And west.

MR. PERRY: I would have said, from a visit out there, that they place Japanese as their second nationality now, not Canadian.

PROF. McWHINNEY: Just as Germany enters Quebec in the industrial investments sense.

DR. FORSEY: Don't forget the Atlantic provinces either - very highly developed sense of

their own individuality.

THE CHAIRMAN: "Canada should be a
"fully sovereign parliamentary democracy."

PROF. MEISEL: What does "sovereign"
mean in that context? Isn't sovereignty like
pregnancy?

THE CHAIRMAN: Capable of amending
itself for one thing.

PROF. McWHINNEY: I think it is a
dangerous term.

PROF. MEISEL: "Fully" could be dropped.

PROF. McWHINNEY: Also I wonder if you
want "sovereign". That contains in its term
implicit legal assumptions. You may want to have
this in, but if you don't ---

THE CHAIRMAN: I had some trouble with
this proposition myself, so I would like to pin this
down a bit.

PROF. McWHINNEY: "Canada should be a
parliamentary democracy", is there any objection
to that?

DEAN LEDERMAN: That is better, is it
not?

PROF. McWHINNEY: Sovereignty in an
external sense. Is it intended to cover
symbolic associations with the United Kingdom and
abolish them sub rosa? It may or may not be
a good thing but it raises this assumption. Is

is trying to drop the vestiges of a quasi-sovereign status in an external sense?

In an internal constitutional sense, of course, it relates to the nature of the parliamentary power. Is it sovereign in the English sense, that there is no fundamental constitutional law and no power in the Courts to rule in constitutional matters; or is it less than sovereign in the sense of the American Congress?

You may want to give emphasis to this question under this proposition, but you should do so openly and not use a term that has got legal connotations in those two senses.

PROF. CONWAY: I think, since it seems to me we are approaching the whole argument we have been working towards for the past three and a half years, if we could have it circulated, I would very much appreciate what you have said on a piece of paper.

PROF. McWHINNEY: I think it will emerge on a piece of paper. I don't mind doing it again. I wanted to point out the implicit legal assumptions of external independence

in the use of the word "sovereign". If you want to carry this term across, well and good; but if you don't want to take any position at this stage, it will be better to strike the word.

DEAN LEDERMAN: I agree the word "sovereign"

is a trap. You have to be very careful with it.

DR. FORSEY: I also felt uneasy about it for precisely the same reason.

THE CHAIRMAN: There are two things I wondered if there are implicit here and can be taken to be implicit here. One is the question about having the capacity to amend one's own constitution; and the other is: does it contain an implication that Canada would be a sovereign parliamentary democracy without a sovereign? Does this mean "fully, internally independent" as it were?

PROF. McWHINNEY: You see, if you want to state this term, you could presumably have a proposition something like: "Canada should be a fully independent self-governing country" which I think it is -- "parliamentary democracy with power to amend its own constitution through internal constitutional arrangements."

DR. FORSEY: As it stands it can lead a suspicious conference to believe this was an attempt to impose something like a glossy constitution. Of course, that was not the intention, but I think this term "sovereign" has all kinds of implications.

PROF. McWHINNEY: By abolishing the Crown, perhaps you come to some of these funny little things which may or may not be worth abolishing.

DR. FORSEY: The essential thing here, the presumption is that you want to have a country

independent - an independent international personality, shall we say, in the first place, and not subject to external control except in the sense that every country now is by circumstances. The second, that you want to assert the appearance of a parliamentary democracy, presumably in contradistinction to a congressional or presidential form of government.

If you want to do that, I think you ought to be more precise, rather than trying to get a portmanteau term that will take in both things and make neither really clear.

PROF. McWHINNEY: Why not make it: "should continue to be a parliamentary democracy" and then add in your explanation, if you wish, some comments on the amending power.

THE CHAIRMAN: Just a minute. "Canada should continue to be a parliamentary democracy". Now, later on, in the next page, once again we have a specific amendment on the amending - this is in the second page.

PROF. BRADY: There is a certain amount of overlapping on this proposition.

THE CHAIRMAN: I wouldn't worry about this now, because I think when we have done a review we can start pulling some of these together. Later on we have the "suitable amending formula" and these two propositions can be married, as it

were, by simply saying:

"Canada should continue to be a fully
"parliamentary democracy that has a
"suitable amending formula as an
"integral part of its constitution."

PROF. McWHINNEY: Why not keep them
separate, because the thrust surely is towards the
parliamentary system, whereas, as you know, at the
Quebec provincial level one is discussing the
alternative system, the presidential type of
executive.

If your main thrust is you want a
parliamentary rather than a presidential executive,
I would make your proposition limited to that,
and the amending power can come in on its own.

DEAN LEDERMAN: You are raising a
point I wanted to raise. In what sense is the
word "Canada" being used? Are you embracing
provincial legislative assemblies as well as the
Parliament of Canada when you say "Canada should
be a parliamentary democracy"?

PROF. McWHINNEY: You mean the federal
system.

THE CHAIRMAN: If we do, we should say.

DEAN LEDERMAN: Because offhand the word
"Canada" embraces both to me; Canada is the totality
of these things.

PROF. McWHINNEY: We would not necessarily

want to exclude provinces such as Quebec from adopting a presidential type of executive if it wishes.

DR. FORSEY: This hasn't occurred to me before. There has been a good deal of hullabaloo about Quebec adopting a presidential system. George Brown, if I remember correctly, wanted to see the provinces have very much this sort of thing, the American type of executive; a parliamentary system for the country as a whole, but the provinces very much more along American lines.

PROF. McWHINNEY: Daniel Johnston learned by hard experience how difficult it is to make a parliament if your party is weak.

DR. FORSEY: There is nothing wrong with bringing people from outside if you can find places for them.

PROF. McWHINNEY: That is his trouble: he cannot.

DR. FORSEY: There would presumably have to be some kind of limitation that would need some careful discussion, but I don't think we should necessarily say that if any particular province wants to adopt the system, for example, that no Minister has a seat in the Legislature, it seems it is entirely its own business. I think it is an assinine way of doing it, but if they want to

be fools that is their affair.

PROF. McWHINNEY: Let us take up Bill's point and limit it by saying "Canada in its federal form" or something like that "should continue to be a parliamentary democracy"; or "the Federal Government of Canada should continue to be a parliamentary democracy".

DEAN LEDERMAN: That would be it, "federal" or "central".

PROF. McWHINNEY: "Central".

THE CHAIRMAN: Depends what we want to mean.

DR. FORSEY: The purpose politically seems to be that we drop the word "Dominion", our own native word, and adopt the American "Federal".

DEAN LEDERMAN: If we were still using the word "Dominion" here we would be all right.

DR. FORSEY: "Oh what a tangled web we weave when first we practise to deceive".

DEAN LEDERMAN: It is too late now. We will have to say "Central".

PROF. CONWAY: Does not the word "Canada" now imply the government at Ottawa? I ask the legal experts.

DEAN LEDERMAN: Unfortunately not. Some lawyers still use the term "Dominion" strange as it sounds.

PROFESSOR CONWAY: What does it mean internationally, the word "Canada"?

PROF. McWHINNEY: It means the complete group at the moment, Federal Government and the provinces operating through the Federal Government.

THE CHAIRMAN: What we want to say here is the point.

PROF. McWHINNEY: We are trying to convey, I think, what used to be called "The Dominion Government of Canada should continue to be a parliamentary democracy". In other words, we want to plump for the system of parliamentary democracy, but we do not want to exclude one or more provinces from taking the initiative in their own provincial constitution to have another form.

THE CHAIRMAN: Do you think this is our original phrase?

MR. GREATHED: I don't think we thought of the particular nuance that has been raised over the question of "Canada". I am not sure whether we thought of allowing this or formally proposing this flexibility at provincial level.

PROF. McWHINNEY: We are not proposing it. I think the proposal in the section is that you should not deliberately exclude it by your choice of language but your proposition should

be affirmatively limited to the central government. In other words, "Canada in its central system of government should continue to be a parliamentary democracy", something of that sort.

THE CHAIRMAN: "Government at Ottawa".

PROF. McWHINNEY: Yes, precisely.

DEAN LEDERMAN: That is what is meant.

MR. PERRY: This does not seem to be an overwhelmingly persuasive point we are making. What we are saying, we do not want a dictator or a president in Ottawa.

PROF. McWHINNEY: No, once you adopt this, you exclude the system now being discussed in Quebec at the provincial level, a system of Ministers outside of Parliament and separate executive .

MR. PERRY: If that would be acceptable in Quebec, why not in any other province, and therefore why not in Ottawa?

PROF. McWHINNEY: I take it you wanted to exclude it in Ottawa. If you don't want to exclude it, it is a new ball game.

THE CHAIRMAN: You don't need the proposition.

PROF. McWHINNEY: You don't need the proposition. I can tell you, Harvey, in principle there is no reason why we should not discuss the alternative federally.

DEAN LEDERMAN: But I think the original meaning was the central government at Ottawa should continue to be a parliamentary democracy system.

PROF. McWHINNEY: You might even strike the "parliamentary democracy" and say "parliamentary system".

PROF. MEISEL: I think we cannot say "central government". It should be the "central system of government". The government is not a parliamentary democracy; the system is the parliamentary democracy.

PROF. McWHINNEY: It is the parliamentary system of government.

DEAN LEDERMAN: I think that would be a better phrase.

DR. FORSEY: Government of Canada, Canadian executive government, the government of the country.

DEAN LEDERMAN: The only point is, if Quebec people are serious about wanting to go part way to a presidential, congressional system within their province, they would boggle at this, if they give "Canada" the same meaning as I do.

PROF. MEISEL: Ottawa may want to become a city state.

PROF. BRADY: Was there much discussion on this sort of thing at the conference of Officials?

THE CHAIRMAN: I don't recall.

MR. GREATHED: Not specially, no.

PROF. BRADY: Where did this suggestion come from?

MR. GREATHED: I think it was developed here. It was when we were considering the whole question of putting down what seemed to be preliminary objectives, but when you are precise and state propositions on the objectives ---

THE CHAIRMAN: Basic objectives, yes.

MR. GREATHED: So we went right back to motherhood and started taking this particular one.

I think we had in mind the central government. I suppose the only question that arises is that all governments in Canada should or certainly can comment on the form of government of another.

PROF. BRADY: It is actually not a question that is under debate, is it? That is, you are preparing for a conference that will discuss constitutional amendments. I don't think the parliamentary system of government has really been a matter that has been considered.

MR. GREATHED: The idea was to say what the whole gamut of propositions would be concerned with - objectives: what did people think of when they thought about objectives? So that everyone understood.

PROF. BRADY: Your task would be simplified if you confined yourself to the things

that really entered into the issues today; and the issue pertains really to federalism in one or other of its varied aspects, the ethnic factor in federalism, the linguistic.

I have no objection to this, but I do not think it is very important, that it is going to enter into your discussions in Ottawa.

PROF. MEISEL: No, but it should be included. It seems to me that some of the general things that can be established, perhaps precisely because they are not points over which there happens to be much disagreement, should be accepted and stated. They won't lead to too much discussion probably, but they do unwittingly mean that people make commitments to certain things which they cannot fully realize, and this all has to be gone through simply as a sort of glue that binds the group into some sort of common goal.

PROF. McWHINNEY: Alec is being English; Johnny is being continental.

PROF. BRADY: Fundamental cleavage.

THE CHAIRMAN: It has a certain psychological impact where we are trying to establish some common ground.

DEAN LEDERMAN: In addition, this is related to something which is in the public front, the Senate, and there is talk of increased powers

for a Senate as an appointed body. If we like to see a parliamentary democracy, I would like to see that phrase in there.

THE CHAIRMAN: So would I.

PROF. McWHINNEY: You are thinking in that sense of the initiation of an Upper House.

DEAN LEDERMAN: I am not sure I want Paul Martin running Canada's foreign policy now that he is a Senator.

PROF. BRADY: I don't think it is likely.

PROF. McWHINNEY: I remember the last time I was talking to Lalonde he was talking about a great many constitutional changes. Have the federal people dropped any hints that they might be interested in a congressional, executive type of thing, strong executive government? Are they likely to bring anything forward different from this? They are good civil lawyers, after all.

DEAN LEDERMAN: My basic worry about the whole federal approach in February was that there was not a whisper from them about the implications of parliamentary democracy and responsible government. Their Bill of Rights thing that they were pushing so hard did not mention the right to vote. Incidentally, it does not mention the right either to mobility between

provinces, for citizens to move freely and settle and make their living in any province, and this can impinge on the whole immigration problem.

They were, I think, forgetting - I don't think deliberately or by design - but there was a pattern there that alarmed me of disregard of the essentials of representative parliamentary democracy and responsible government.

DR. FORSEY: That is one of the legacies of Mackenzie King.

DEAN LEDERMAN: So this belongs.

THE CHAIRMAN: This exercise is a two-edged sword. In addition to trying to find our rationale for a position that we take, we are also playing the game of trying to find out what the other fellow is leading to. One way of opening the discussion to get at that kind of thing is to put this out and say: "Now, what is your position on it?".

DEAN LEDERMAN: I think this criticism may have got through to Mr. Trudeau in some way or another, because I think it is quite noticeable lately that he is talking much more about making the parliamentary system more effective.

PROF. SYMONS: At the same time, Mr. Chairman, there is in circulation now a working paper, study paper, proposing, examining - I don't know if other members of the Committee have seen it,

but it has been prepared by Mr. Trudeau, proposing some congressional system, and it was prepared during the summer. It is under study now by an inner group in the Cabinet.

THE CHAIRMAN: I take it this explained what on the surface appeared to be a rather petulant reaction, and that there must be something that did not come to light and they were fortifying themselves for that battle.

PROF. McWHINNEY: The whole picture may be changing to one of looking at a strong Prime Minister's office with dramatically increased powers, independent secretariat, use of the committee system. There was a good deal of both the continental European civil law thinking going in there, and some approach also to the American principles.

My own feeling is the civil lawyers who are around Mr. Trudeau probably are drifting, as Bill implies, away from a more traditional parliamentary type of system into some sort of hybrid.

If Ontario takes this position, I suppose it will at least force a discussion on fundamentals at that point.

PROF. McWHINNEY: Are we clear though? I suppose the point remains whether Ontario necessarily wants to take the position that there

should be a parliamentary system.

DEAN LEDERMAN: There is another factor in the McRuer Report No. 1. Making parliamentary democracy and responsible government work, it is the whole thrust of it right throughout the whole administrative apparatus; and the Premier has said, I think, that he approves Report No. 1.

THE CHAIRMAN: There is not much doubt about the view of the Ontario Government on the question of parliamentary democracy, that is certain.

The other interesting thing is the extent to which the spirit of Mackenzie King still hovers over the Liberal party. I find it terribly interesting that this is still coming through.

PROF. McWHINNEY: You think it is Mackenzie King and not this bright young Montreal group that has a good deal of training in post-war France. It seems a lot of these proposals from English-speaking Canada that seem to be Americanizing the Canadian system, are really Gaulising it by the usual stereotypes that the French are being taken over.

PROF. SYMONS: I think it is comfortable for the group to be able to put on Mr. Mackenzie King's mantle, but I think their inspiration is from quite different sources.

DR. FORSEY: I was once startled by Mr. King's secretary saying he had arrived at the conclusion from long association with Mr. King, that he had no real understanding of parliamentary^{government.} If the other factors come into it, the undoubtedly American and continental influence, the young civil lawyers in Montreal, I think the other thing is true, that this has helped to condition the Liberal party.

I am delighted to see that the Ontario Government is likely to stand up for parliamentary democracy. It renews my hope, and at last somebody in the Conservative party will get some idea of what it is he wants to serve and will do something about it.

THE CHAIRMAN: The other fact that has always interested me is the apparent difficulty of distinguishing between the civil service and the government (following the remark you made about Mr. King), the extent to which you move in and out with apparent ease.

DR. FORSEY: Pearson, when Secretary for External Affairs, he set forth the principle, on which I commented in suitable terms at the time, he set forth the principle that this should be the normal avenue of advance in the Cabinet.

PROF. McWHINNEY: It has continued - Favreau and Mitchell Sharp, I suppose.

PROF. SYMONS: I think we should notice that whereas Mr. King used to take civil servants to create politicians, Mr. Trudeau's approach is the reverse: he takes politicians and makes them civil servants. I think the total is 14 since June.

THE CHAIRMAN: I shall hope that this government will never proceed in either direction.

DR. FORSEY: You don't want to use the word "never" because there may be occasionally justification for doing one or the other.

Anyway, I very much hope that the Ontario Government will take a stand on this thing, whether in the form of preparing propositions or in the course of discussion, because I think the case for parliamentary democracy deserves to be heard, and it is possible that it won't be heard effectively unless somebody like the Ontario government, whose voice will carry, makes it heard.

DEAN LEDERMAN: I think the phrase ought to be there, and it will raise the issue whether what is being done is consistent or inconsistent with ---

THE CHAIRMAN: I want to smoke it out really.

PROF. McWHINNEY: Maybe that might stand with this amendment suggested. Perhaps the only thing you need to do with the supporting material is take this section on constitutional

amendment out if it is covered at a later stage.

THE CHAIRMAN: All right. I think we can find our way along there.

"The written constitution of Canada

"must be flexible enough to be adapted

"periodically to fundamental social

"changes."

PROF. McWHINNEY: What is meant by "legislative review" in that sense on page 8:

"The written constitution must provide

"more scope for flexibility by

"legislative as well as judicial

"review."

You mean by amendment, by the constitutional amending power as well as by judicial review?

THE CHAIRMAN: Would you like to speak to that?

PROF. McWHINNEY: Then it would be better to render it in that technical sense, if that is the intention.

MR. GREATHED: All right.

PROF. McWHINNEY: I suppose, more flexibility by means of the formal constitutional amending power as well as judicial review.

DEAN LEDERMAN: "Judicial review" is rather a technical - has developed special meaning in this field. You don't think of a Legislature reviewing itself.

PROF. BRADY: I have doubts about No. 2:
 "Since 1867, the dramatic pace of social
 "and economic change has not been
 "matched by a sufficiently supple
 "written constitution - in part, because
 "of lack of agreement on a suitable
 "amending formula."

I think you can challenge what seemsto be intended
 to be a statement of fact.

DEAN LEDERMAN: Just not historically
 so.

PROF. BRADY: I wouldn't think it is
 historically so.

DR. FORSEY: No, I agree. I would
 even go further and say that the statement that
 flexibility has been introduced in the B.N.A. Act
 by means of judicial interpretation, might be
 contested almost to the point of saying flexibility
 has been taken out of the B.N.A. Act by judicial
 interpretation. Either one would be an
 exaggeration, but I think to put that statement in
 there is certainly an exaggeration.

I don't see why we shouldn't simply
 stop off at "sufficiently supple written constitution".

THE CHAIRMAN: I think that is right.

DEAN LEDERMAN: Stop there.

PROF. McWHINNEY: Leaving the last
 sentence in as amended, would you, quoting the

amending process?

DR. FORSEY: For a long time there was very little discussion of the **suitable** amending formula. It was pretty well taken for granted that if the two Houses of Parliament asked for an amendment, they got it. Now and then a province will add squawks about being consulted, but down into well in the first century at least nobody paid much attention to that. Indeed, it was not until about, I should say, 40 years ago that really became anything like a widely accepted view.

DEAN LEDERMAN: It is all very well to say "the written constitution must provide for more flexibility by legislative as well as judicial review". I would agree with that as a general proposition, but if the American constitution is to be the great example, 150 years - 30 amendments, 12 or 15 of them ---

PROF. McWHINNEY: Not even 30. What is it, 26?

DEAN LEDERMAN: Twelve of them being of the original constitution-making process, and the rest of them not terribly important. That two-thirds or three-quarters majority is going to be as tough to get as ever.

I am sure constitutional amendment has been occasional and always will be. The only

place where it has not been occasional now is in Germany where you get one-party government with such overwhelming control that they could get this two-thirds or three-quarters majority, and the fractions don't mean anything, isn't that so?

PROF. MCWHINNEY: Yes. I would add too, there are some other states, some at least European ones. Albania, I believe, has changed its constitution from time to time.

PROF. BRADY: Of the representative states, I suppose Switzerland is probably the only one ---

PROF. McWHINNEY: Switzerland is the only federal where the amending process is really used.

DR. FORSEY: Is it suggested then that the whole of the same paragraph might be scrapped?

PROF. CONWAY: I shouldn't think so. That statement, as I got the general sense of paragraph 2, although I am sure it should be in more precise language, as has been pointed out, is that whatever amended constitution or new constitution we come up with, it should have, in view of the times we live in, it must have the ability within itself for change where necessary.

We are not living in times where the

case could be taken all the way through the Privy Council from various cases. We need something that can act more quickly.

PROF. McWHINNEY: Why not, in the first sentence, deleting the "in part" phrase and the last sentence as amended would meet Alec's and Bill's suggestion.

THE CHAIRMAN: I think that will be satisfactory, if that is agreeable.

DEAN LEDERMAN: Yes.

PROF. MEISEL: A minor point on the first paragraph of page 7. It seems to me there is a redundancy:

"To be functional and effective ..."
It seems it can be either "effective" or just
"a constitution must reflect..."

PROF. McWHINNEY: Didn't we have this somewhere before, that the constitution must reflect the ideas and values of the society?

PROF. MEISEL: I don't remember.
I think the word "functional" can lead to some curious results.

DR. FORSEY: One of the two is superfluous.

THE CHAIRMAN: "To be effective".

MR. PERRY: I mention one thing in the explanation. You refer to "social and economic change" whereas the main proposition

mentions only social changes.

THE CHAIRMAN: Yes, I think we have another proposition later on about the regional disparity business. Perhaps this should be confined to the social, should it?

MR. GREATHED: They might be married.

DEAN LEDERMAN: The word "social" being added to society can improve everything.

PROF. McWHINNEY: It is more comprehensive.

DEAN LEDERMAN: It can include economics.

PROF. McWHINNEY: You can use the phrase "societal change" which is used to cover social and economic changes.

DEAN LEDERMAN: But the word "social" change refers to the total economy, includes economics.

DR. FORSEY: That is what my old colleague Sidney Barrett called "them big long words that go over the heads of the workers".

PROF. McWHINNEY: Except the workers do have change.

PROF. CONWAY: I would say "social and economic".

THE CHAIRMAN: I think it is an accepted phrase.

DEAN LEDERMAN: In current use, "social and economic" would be broader.

THE CHAIRMAN: May we do one more proposition and break for lunch? This next one is rather like a slogan from the last election:

"The federal government must speak for
"all Canadians".

PROF. McWHINNEY: The next ones read like the Speech from the Throne, the explanations.

PROF. MEISEL: I am in full sympathy with that statement, but I wonder whether criticism of it is what we want. I cannot think of anything better, but obviously there are many occasions when the Federal Government does not speak for all Canadians.

PROF. McWHINNEY: What do you want to do here? Do you want to cover the foreign affairs power issue?

THE CHAIRMAN: This is their problem. I know in this one the Prime Minister had the same concern. He said he understood the objective, but he was not quite certain that the language was right.

PROF. McWHINNEY: Do you want this in at all?

DR. FORSEY: For certain purposes the central government speaks for all Canadians.

PROF. McWHINNEY: But not for others.

The first of these is the fact that the
 government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference in the
 internal affairs of the country.
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 policy of non-interference in the
 internal affairs of the country.

DR. FORSEY: One of the main questions is for what purposes? For certain purposes it cannot speak for all Canadians.

MR. GREATHED: We tried to explain this in the accompanying note. I think the explanation is there. Perhaps what we need to concentrate on is the wording of the proposition.

18

PROF. MEISEL: "Within its sphere".

MR. GREATHED: Yes, that is the kind of thing.

PROF. McWHINNEY: It is either true - speaks for them, or else it takes a position on something, that you may want to take this out or not. Is this one place where you handle the foreign affairs power, for example? Is this one of the things that came up during the summer?

THE CHAIRMAN: I suppose it does by its very breadth. There is no specific purpose.

PROF. MEISEL: Surely what is intended is "within the sphere assigned to it by the constitution".

DEAN LEDERMAN: "On all federal subjects".

PROF. McWHINNEY: What about the proposition - matters allocated to them the provinces speak for themselves? Does this include the international level?

MR. GREATHED: I don't think we were

thinking of particular category of subjects.

I think it was a little more general statement which was reflected in the kind of explanatory notes.

PROF. CONWAY: I think if we work back from the explanatory notes to the statement, the explanatory notes make it perfectly clear, so it seems to me, that the provinces "must recognize the unique position and responsibilities of the Federal Government", which is something very much under discussion.

DEAN LEDERMAN: It is the foreign affairs power that this is getting at.

PROF. BRADY: Is it not desirable to be more explicit?

PROF. McWHINNEY: Or to strike it.

PROF. MEISEL: Is there another way to make it even more general, to take out the word "must" and say "speaks for all Canadians" which means that you do not say it must speak for all Canadians, but when it does speak it does speak for all Canadians.

MR. GREATHED: Mr. Posen reminds me that part of our thinking here was a reflection of what Mr. Robarts said in his February 5th statement; partly to counter the suggestion that the government of Quebec speaks for all French-speaking Canadians. I think this was more in

our thinking. I am glad of that reminder, thank you, Gary. In fact, we went very carefully through Mr. Robarts' statement in some of our thinking about the basic premises that Ontario had set out in its earlier statements, in order to arrive at some ---

PROF. McWHINNEY: Why don't you limit it then - it is a very important point for Ontario - and make it: "...and no province has the right to claim to speak for persons resident in other provinces".

MR. GREATHED: We were trying to avoid negative subjects in this.

DR. FORSEY: It seems to me what you ought to say is whatever matters you decide are within the jurisdiction of the central parliament and government, the central parliament and government speaks for all Canadians; all matters within the jurisdiction of the several provinces, each province speaks for all issues on that level, which is Mr. Robarts' point about Franco-Canadians surely, that the Government of Ontario speaks for all Ontarians.

PROF. McWHINNEY: It is not precise enough, because it also presumably leaves open the issue, by implication, that you are suggesting leaving an interpretation that the province speaks outside of the country for its citizens on

matters within its responsibility.

DR. FORSEY: No, that wouldn't follow - simply within its jurisdiction, and the jurisdiction is the jurisdiction which will be defined in the constitution presumably, as in fact it is.

DEAN LEDERMAN: As it is explained by Mr. Greathead, the proposition on page 9 becomes the same thing as the proposition on page 12, much the same.

"Each level of government must respect
"the constitutional jurisdiction of
"the other."

MR. GREATHED: I think, as the Chairman has suggested, that towards the end we might come to the point where some of these can be brought together.

PROF. BRADY: I think that is very important. I think all these propositions will be looked at ---

THE CHAIRMAN: In the whole.

PROF. BRADY: In their relationships in the whole.

THE CHAIRMAN: Yes.

PROF. BRADY: Mr. Chairman, perhaps we have said enough on this to indicate, I think, it needs to be made more specific. We don't

want general statements, as it were, that are so general they are almost meaningless. The relevance of the statement is important in the proposition, I would think, and to make clear the relevance would be important in this particular proposition.

DR. FORSEY: May I again raise a stylistic point. Surely we can dispense with the ghastly Ph.D. superfluous verbs:

"The ten provinces taken together speak
"for the same people as does the
"federal government."

"As the federal government". Who in the world talking English says: "John is taller than is William?" Nobody with any sense of the English language ever does that, but these infernally over-educated people will go on leaving these wretched things in, and it just bristles down the back of anybody that has any sense of the English language.

THE CHAIRMAN: Having examined the book which my seven year old brings home from school, I am afraid they are taught that.

DR. FORSEY: I can show you the passage in Fowler's English Usage. It is a dreadful mess. It is one of those over-fussifications of the English language - "John is taller than is William" but who under the sun ever says it?

THE CHAIRMAN: Yes, I think there is the general problem here between the precision point,

which is valid, and yet trying as Ed put it, to establish some basis of motherhood. What we are trying to say here presumably is not that the federal government is supreme in all matters, but that when all is said and done it is the government that represents all Canadians as no other government can do.

PROF. MEISEL: This is the thought running through my mind, and I may be wrong, but just speaking off the top of my head, I wonder if this should not be the idea to get across, that all Canadians are represented by the Federal Government in those areas in which the Federal Government has jurisdiction, and it might be put in that way.

MR. GREATHED: Although the construction that the Federal Government represents, as the Chairman said, all governments as no other government can do, perhaps meets that point.

DEAN LEDERMAN: If I may do a horrible thing and quote myself:

"In any event it should be quite clear
 "that the federal government institutions
 "in Canada are not just a sort of
 "Canadian United Nations organization
 "(or united provinces organization) created
 "by the provinces and dependent for
 "continued existence on the collective

"suffrance of the provinces."

I think that is part of what you are trying to say.

"Where federal subjects of power are
 "concerned provincial sub-division
 "boundaries simply disappear and the
 "federal government operates as a matter
 "of original constitutional right in the
 "whole Canadian territory.

"Likewise the provincial governments
 "operate concerning provincial subjects
 "of power as a matter of original
 "constitutional right in their respective
 "subdivisions of the national territory.

"In total operation this provides
 "a system of government for the whole
 "of the Canadian people and territory on
 "all legislative subjects"

PROF. SYMONS: Couldn't we simply put
 this forward as our proposition, Mr. Chairman?

PROF. MEISEL: I think that raises a
 number of different points.

DEAN LEDERMAN: I go on to say that
 this:

"In total operation provides a system of
 "government for the whole of the Canadian
 "people and territory on all legislative
 "subjects, a system that is vastly
 "superior to anything possible by agreement

"between independent countries under
"the present regime of international
"law."

I am leading into an attack on the
associate state idea here.

"Specifically, under the Canadian
"federal constitution, where inter-
"governmental co-operative measures
"are desirable in provincial relations,
"both federal and provincial Ministers
"and legislatures are under the
"salutary political pressures of the
"need to respond to the wishes of the
"electoral body of citizens in the
"same territory."

They are speaking for the same people in
the same territory but on their respective subjects.
That is enough of that quote, but it is a very
valid point.

PROF. BRADY: Very valid, and of course
it reinforces some former remarks and propositions
on the nature of federalism which cannot be too
emphatically brought out. That is what we are
basically concerned with, is it not, in these
propositions?

THE CHAIRMAN: Well, this is a tough
one, because it is so simple in its appearance,
and I think perhaps we could adapt or abbreviate

something from that passage, Bill.

DEAN LEDERMAN: I don't know, I think it is the basic idea of federalism that is being dealt with in here.

DR. FORSEY: If you leave the thing as it stands, you are going to run right into, I am afraid, justified suspicion or objections from the Province of Quebec, for example.

THE CHAIRMAN: According to the note which has just been handed me, there was the headline in today's Star which says: "Quebec rejects the one-Canada concept".

PROF. McWHINNEY: If you did not specifically intend here to take a position on foreign affairs power, then I think the statement should in its precision cover what you did intend to cover; and if it was really directed towards the concept which Mr. Robarts has expressed publicly, and Daniel Johnston it seems to me accepted, that he speaks for all Ontarians (Mr. Robarts) including Franco-Ontarians, and Mr. Johnston *mutatis mutandis* for those people in Quebec, that is what you should be aiming at.

Maybe we could simply leave it with you and Ed, Mr. Chairman, to incorporate.

THE CHAIRMAN: *Mutatis mutandis* but apparently no longer a *fortiori* (laughter).

PROF. McWHINNEY: And sometimes sub

rosa.

THE CHAIRMAN: I think we will have another shot at this one, with the benefit of this advice, and I will be having a session with the Prime Minister on Monday to go over this in terms so we can get this pinned down a bit.

I think we might eat.

--- The meeting adjourned at 1.00 p.m.

(Page 120 follows)

THE CHAIRMAN: Well, page 10 - I think the plot begins to thicken a bit.

"Provinces in Canada should have
"separately or severally a variety of
"relationships with the federal
"government."

PROF. McWHINNEY: What did you want to say here: particular status if necessary but not necessarily particular status?

THE CHAIRMAN: I think this emanated directly from the statement that the Government gave at the February conference in which it spoke about the different conditions that existed in different parts of the country; therefore, the appropriateness of differing treatment rather than a complete uniformity of relationships across the board between the Federal and the Provincial governments.

DEAN LEDERMAN: Would the word "may" be better: "Provinces in Canada may have separately ..".

DR. FORSEY: It is pretty sweeping as it stands, and the explanation raises the same question. For one thing, it is not quite true to say that the B.N.A. Act treats all provinces on an equal basis in the distribution of powers. It does not. There are a number of ways in which it does not.

It might be better, I think, to mention that there is to some extent a special status for most of the provinces, and it is perhaps worth

examining whether in some circumstances this might not be extended.

Then you have the statement on the next page in No. 4:

"A variety of arrangements, through
"such devices as delegation..."

I would question that as something on which I would like to hear competent legal opinion.

THE CHAIRMAN: Any of the lawyers wish to treat that point?

PROF. McWHINNEY: Was it point 4 had the thrust of your comment, or simply a solicitation ---

DR. FORSEY: No, the point I am thinking of: does the Government of Ontario want to commit itself to delegation of powers and, if so, on what basis?

My recollection is that a number of my friends of the legal profession, whom I respect, were rather dubious about the delegation section of the Fulton-Favreau formula.

I wondered whether this would be taken as approval of that or something analagous, or whether it is intended to mean a general reciprocal power of delegation available to everybody at all times, or whether it is going to be limited or what.

It seems to me to be a throw-in to approve such devices as delegation, as again leaving the door very wide open for considerable developments to come in.

PROF. McWHINNEY: I think Eugene is right in the general thrust of the point he is making. I noticed before the tendency is to fuse certain objectives in these propositions.

If the thrust here is to say that status as such is not repugnant, and due canon should, if need be, have a variety of constitutional arrangements within the constitutional system, which are certainly true of most federal systems anyway; then it should not really be complicated ^{by what} / would seem to be a special institutional system or a special institutional device such as delegation.

It might be better really to delete the reference to "delegation". I think it is not so much a red herring, but it is an unnecessarily complicating point to the first point you are trying to make.

DEAN LEDERMAN: I think that is about right. I am opposed to the Fulton-Favreau formula, part 2, on delegation. I think it is wrong. I think Mr. Trudeau opposes it and has for many years on the same ground, but that is legislative delegation, primary legislative delegation. If you are dealing at the administrative level with the main guidelines laid down in the proper Parliament, then it is another matter. In our administrative delegation we get all kinds of it built in all over the country, and it is pretty good.

DR. FORSEY: It seems to me it should be

either less specific or more specific; it falls between two stools. It might cover an enormous variety of forms of delegation, administrative, legislative.

There is absolutely nothing to indicate any limitation upon it, and some qualifying phrase at least ought to be introduced.

Also I can't help feeling that the "variety of relationships" business is again rather vague. You may remember the language when we had that conflagration with the Ontario Deputy Minister, the one in which ---

THE CHAIRMAN: I was just thinking of it.

DR. FORSEY: He brought up something he got from God knows where, about Prince Edward Island having special status, and I replied that Prince Edward Island was perhaps one of the few provinces that did not have special status. Then he made a series of remarks about representation in the Senate being out of proportion with the population and section 51(a) and all this kind of thing. I said: "Yes, but this is not what special status ordinarily means. Special status surely means that the provincial government and Legislature either have powers that the other provincial governments and Legislatures do not have, or else objected to the restrictions which do not apply to the other governments and Legislatures."

5. This kind of thing seems to me terrifically vague. It might well allow for an enormous transfer of power one way or the other, from the centre to the province or vice versa, or it might be something quite piffling. It might mean constitutional arrangements, it might mean merely financial arrangements, and people seem to muddle up these sometimes, the business of varying subsidies to different provinces with the idea of a different constitutional or special constitutional status for a particular province.

I think the whole business of special arrangements need to be terribly carefully guarded so that you do not go and commit yourself to a general principle from which other people quite logically draw conclusions which you do not have in your mind at all in the first place.

PROF. McWHINNEY: Why don't you take the delegation thing out? It really belongs in the section on the constitutional machinery arrangements, including amending power and all these other things.

For example, if you really want to achieve or expressly to meet the principle of particular status, you can achieve it directly by a new constitution or in other ways. If the main thrust is this, I do not think you should complicate it by a discussion of particular institutional means of achieving it; particularly where the one that

you cite happens to be, rightly or wrongly, as controversial as the delegation issue has become since the Fulton-Favreau formula and since the rather unsatisfactory Supreme Court decision on the same thing.

PROF. BRADY: I would agree that we drop that clause "through such devices as delegation", although I think the general statement here is a very desirable statement to have, that a variety of arrangements may exist within the federal system. However you phrase it, the idea of different arrangements between the provinces and the Federal Government is surely a very valid one, and it actually conforms with our federal experience in Canada in the beginning, and is likely after all to be of significance in the Canadian federal system in the future hardly less than in the past. So I can see a real point in stating it, although delegation is a controversial one.

I might say that Ontario was never enthusiastic about delegation. It was introduced to the Fulton-Favreau formula very much to satisfy some of the smaller provinces, especially the Maritimes and some of the western ones. Nova Scotia was most emphatic in requesting it. Manitoba was very much for it. Saskatchewan was for it. Ontario went along, you might say, with it because there seemed to be such a strong opinion in these other provinces that it was desirable.

7

DR. FORSEY: I cannot help feeling that the end of the statement there in 2 needs qualification, and I cannot help feeling also that you might need a little more safeguard than the final point of NO. 4.

"A clear delineation of the nature and
"extent of these arrangements should be
"established to ensure the maintenance
"of a federated national entity."

I would like to make clear, if you are going to talk about special status, the explanation of special status, which already most provinces enjoy, is to give some idea of the limits; because it seems to me that if you go very far in the way of the transfer of legislative jurisdiction from the central parliament to the provincial Legislature, or more especially to one provincial Legislature, it is probable what would happen in a good many matters, you are going to endanger the maintenance, as you say here, of a federated national entity.

I think it should be a little more gently stated here. I have little patience with people who say you cannot have any arrangement for one province that is not the same as for all the others. On the other hand, I am desperately afraid of people who say: "Well, the statutes in Alberta have a slightly different version of the religious rights and education guarantee from Section 93 and this hasn't brought the house down. So why shouldn't

8

we transfer the power to regulate banks to the provinces? After all, it won't amount to anything and it is an extension of the same principle".

I would be inclined to put in some safeguarding clause there a little bit more emphatic than "the maintenance of a federated national entity".

MR. PERRY: What about a more guarded statement, perhaps that the relationship of all provinces with the Federal Government need not be uniform?

DR. FORSEY: Yes.

MR. PERRY: That is not making a very sweeping positive declaration, but it does recognize that there will be variations.

DR. FORSEY: I think it would be useful also to make some reference to the fact that there are differences now. For instance, in fact under Section 93 (it is pretty much a dead letter in certain ways) under Section 93 the position of Ontario and Quebec is not precisely the same, I think I am safe in saying. Manitoba is given a different system in regard to this, slightly different; Saskatchewan and Alberta slightly different again; Newfoundland under a very special regime in this respect; and the other provinces come under the general provisions of 93, but have applied to them in a way they tend to apply to Ontario and

Quebec. Then you have the special process allowing New Brunswick to continue to levy the export duty on timber existing under title 15 or something of the Consolidated Statutes of New Brunswick, pre-Confederation.

Then, of course, you have the fact that Quebec is presently the only officially bilingual province, that it is restricted in its re-distribution of seats in the Legislative Assembly by special provision.

You have variations in constitutional matters among the provinces, and this is something, therefore, that cannot be regarded as a complete novelty or vastly revolutionary. On the other hand, it does not follow that because a pinch of salt is already in that you can dump a half pint of it on your lunch and everything will be all right.

DEAN LEDERMAN: Historically the big example is the Dominion Government's retention of the ownership of all the natural resources in Manitoba, Saskatchewan and Alberta, to control the Dominion land settlement and immigration policy, which they had until 1930, and the vestige of it left now they returned, they handed over natural resources to the western provinces, the ownership of the land. They reserved not only the ownership but legislative powers, complete legislative powers to the Federal Government over the national

parks in those three western provinces. That is why Alberta, in relation to Banff National Park, is in a completely different position. Legislative power of the Federal Government over Banff National Park and other parks in the western provinces is reserved in the British North America Act 1930. It is in the appendix but it is there. When you talk about a national park in Prince Edward Island, you are not talking about the same animal as a national park in Alberta.

DR. FORSEY: I never knew that. It is fascinating.

PROF FOX: Any difference in mineral rights?

DEAN LEDERMAN: The Federal Crown until 1930 owned all Crown lands completely, mineral rights and all.

PROF. FOX: I was thinking after that.

DEAN LEDERMAN: No, mineral rights are still completely owned by the Federal Crown.

PROF. FOX: All over?

DEAN LEDERMAN: In the national parks.

PROF. FOX: I mean in the prairie provinces.

DEAN LEDERMAN: No, ownership includes the surface and the mineral; it was all handed back in Crown land, which the Federal Crown has opened to private investment.

THE CHAIRMAN: I think we have that one, and I think the sense of it is, as Mr. Perry suggested, that the relationship of the provinces with the Federal Government need not be uniform - something in that sentiment - plus the amendments in the explanation.

MR. GREATHED: Sounds less vulgar than ours.

DEAN LEDERMAN: I would be inclined to say: "Need not be uniform in all respects".

PROF. BRADY: Would there be any advantage in indicating somewhere here that this has been the situation or a marked feature?

THE CHAIRMAN: We might have another thing to that effect.

PROF. McWHINNEY: And add that not only Canadian but it is commonplace to comparative federal experience.

THE CHAIRMAN: All right, we will leave that. Page 12:

"Each level of government must respect

"constitutional jurisdiction of the other."

This is what was lifted from one of the explanatory notes in an earlier proposition. Does this presuppose, do you think, the elimination of all gray areas? Must, mustn't it?

DEAN LEDERMAN: If it does, it is reaching for the moon.

DR. FORSEY: I am afraid you cannot get rid of gray areas entirely, but you attempt to get rid of them as far as you can.

PROF. McWHINNEY: It is an attempt to reflect in layman's language the well-known legal principle of federal primity. It is very sensible and very rational.

THE CHAIRMAN: It is probably apt to say that the old gray areas ain't what they used to be. (Laughter).

PROF. FOX: Mr. Chairman, I don't know whether this question was raised this morning (I am sorry I could not be here) but the use of the word "level" in this context bothers me a bit. Has this been discussed?

THE CHAIRMAN: No.

PROF. FOX: I know the earlier phrase is "senior and junior governments" and "level" implies a hierarchy of power. The way it seems to me, the abstract goals of federalism imply there is no hierarchy in power. If I am wrong, please correct me, but I do not think we ought to perpetuate a myth if it does not exist.

PROF. MEISEL: Is there not a proposition somewhere which explicitly states that the Federal Government has primacy?

PROF. McWHINNEY: No, only in its own areas.

DR. FORSEY: There is hierarchy in the constitution as it stands. It was intended to be a very strong one.

PROF. McWHINNEY: What is the word you would suggest?

THE CHAIRMAN: "Each government".

PROF. FOX: Either "sphere" or "sector".

PROF. McWHINNEY: "Each sphere of government" may do it.

DEAN LEDERMAN: "Central and provincial governments must respect the constitutional jurisdiction of each other".

PROF. McWHINNEY: That would do it: "Each partner to the central system must respect the constitutional jurisdiction of every other member" or "each other member as far as respecting the constitutional jurisdiction of every other member".

DR. FORSEY: Why not just say what Dean Lederman said was exactly what you mean? I dislike the word "level". It is one of the miserable words ridden to death, - a little less than it was a few years ago, thank heavens, like "in terms of".

MR. PERRY: We can just take out the words "level of" and it would still be an accurate sentence.

DR. FORSEY: Why not? "Each government must respect the constitutional jurisdiction of

the other".

PROF. McWHINNEY: "The others".

DR. FORSEY: You could shorten No. 1, the third line, and say: "Each has its own responsibilities" instead of tediously repeating "level of government".

PROF. MEISEL: So that it does not focus on the relations between the two tiers.

PROF. FOX: I don't think "sphere". I think the word, as I recall, was the one appearing here in the next line "jurisdiction" which would seem to be sufficiently vague to cover it, but you may want more than one word.

DR. FORSEY: "Each jurisdiction has its own responsibilities"?

PROF. FOX: Yes.

DR. FORSEY: Why not? Then you have to take out "legitimately act within its own assigned jurisdictions".

PROF. MEISEL: Couldn't we just say: "Federal - Central and Provincial governments must respect ..."?

DEAN LEDERMAN: "Federal and Provincial must respect the powers and responsibilities of the others". It is what we mean by "jurisdiction" in this context.

PROF. MEISEL: Am I being particularly obtuse in questioning the use of the word "most" in the first line of section 1?

THE CHAIRMAN: You mean, what happens to the others?

PROF. MEISEL: Yes.

DEAN LEDERMAN: Some can be withheld under the Bill of Rights.

PROF. MEISEL: Then they are not part of the government, are they?

DR. FORSEY: Was that to allow for concurrent powers?

PROF. MEISEL: But they are still distributed.

DR. FORSEY: Incidentally, if you have concurrent powers it is going to be absolutely essential - it means you do get a heirarchy. If you have a concurrent power like 94(a) the province is superior; if you have a concurrent power with section 95, the Dominion is superior. This idea of "they are all boys together" will not bolster your concurrent powers - unless you are going to abolish concurrent powers, if that is what you are going to do, but most of it here says you are allowing for the two. Then, of course, you are still distributing it in some way or other.

THE CHAIRMAN: What does the proposition come out to read now roughly?

MR. POSEN: Well, one suggested and Provincial ..."
"Federal /; another one was "Governments must respect the powers and responsibilities - jurisdictions and

responsibilities".

PROF. McWHINNEY: Either will do. It is just an issue of which sounds more elegant.

DEAN LEDERMAN: What about an offer by the Federal Government of conditional grants, to pay you X dollars if ... Is this disrespect to the jurisdiction of the other, in housing, for instance?

PROF. FOX: You can respect your wife and still give her an allowance.

DR. FORSEY: Do you respect her?

DEAN LEDERMAN: I am not going to commit myself on matrimonial arrangements that don't exist.

PROF. FOX: The experience with the B and B Commission was that the psychology of marital relations is not a good one to the federal system.

DEAN LEDERMAN: You know what Mr. Johnson said. It is not that Quebec wants divorce: they just wanted a marriage contract.

PROF. FOX: It is assumed by him possibly it could be with somebody else.

THE CHAIRMAN: Are there any other items?

DR. FORSEY: What is meant by the statement that "judicial interpretation has often been disputed" in No. 2.

"In recent years, formal constitutional
"amendment to the B.N.A. Act has been
"difficult to attain, and judicial

"interpretation has often been disputed."

Is this just off-shore mineral rights?

PROF. McWHINNEY: You mean judicial interpretation has been criticized?

MR. GREATHED: Yes, this example of B.C. off-shore minerals.

PROF. McWHINNEY: Perhaps you should state that more precisely then.

DR. FORSEY: How often actually have judicial interpretations been rejected in the fashion in which various provinces, I understand, said they would reject any decision in the off-shore minerals case? I should have thought very seldom. Of course, you will get criticism - whoever loses a case is apt to be very critical of the verdict of the court - but how often has a judicial interpretation been disputed in the sense, as I take this to have, of being rejected?

PROF. McWHINNEY: I understood Mr. Greathed was using "criticize" .

DR. FORSEY: Is there any court decision that is not criticized?

PROF. McWHINNEY: I suppose. Certainly the Privy Council, Viscount Haldane, as you know, devoted a great deal of time to criticism in strong terms.

DR. FORSEY: "Criticism" is not the right term. He never said "this is not valid".

PROF. McWHINNEY: Bora Laskin for that matter.

DEAN LEDERMAN: That is right. What is new about the off-shore mineral reference is, however, that the Premier of British Columbia and the Premier of Quebec have questioned the power of the court to say anything about it.

DR. FORSEY: How often has this happened?

PROF. FOX: What about the Labrador boundary? Wasn't that Privy Council decision?

PROF. McWHINNEY: Yes, but that is only being attacked by the intelligentsia.

DEAN LEDERMAN: At the time Newfoundland was not in the federation.

DR. FORSEY: Even so, you have only got in effect three cases where you can say this - really two: the off-shore mineral case, where two provinces objected and said they would not accept the thing, and the Newfoundland boundary case where there have been so far vain protests.

DEAN LEDERMAN: Ex post facto.

DR. FORSEY: Very ex post facto. I don't think there was much fuss about it at the time.

PROF. McWHINNEY: I think in a way perhaps criticism is of the subject in relation to the predicate; for what you are arguing for, your next sentence is - I don't think criticism of judicial interpretation or even "dispute" helps it

out: "... subtle, indirect method of jurisdictional change ...".

THE CHAIRMAN: Well, really the sense of the thing is that, for whatever reasons, the real point is that we have come upon a variety of new kinds of ventures - shared cost programmes and what have you; and whatever the origin, which is probably as much political as judicial, the point remains that this should be questioned in the light of respecting constitutional jurisdiction.

DR. FORSEY: If you mean that judicial interpretation has often produced results which were widely regarded as unsatisfactory, and as a result you had the central government stepping in with a shared cost programme that, I think, would be a perfectly valid sort of statement to make; but nobody has said "this is not the law", nobody disputed -- perhaps I am not using "disputed" in the dictionary sense.

THE CHAIRMAN: No, I think this is valid.

PROF. McWHINNEY: Judicial interpretation is held to be stultifying by various governments. I suppose that would make it palatable.

DR. FORSEY: Or "unsatisfactory".

THE CHAIRMAN: We have that sense. Now, the point in this one, if we can go on to 14:

"The federal and provincial governments

"in Canada must have sufficient sources

"of revenue to enable them to discharge

"their constitutional responsibilities."

MR. PERRY: Hear! Hear!

DR. FORSEY: I don't like the crack about the failure of the defects of the British North America Act in No. 1. The real trouble is that the British North America Act provided ample sources of revenue. The provinces in discharge of their responsibilities, two things have happened since. One is that certain undoubtedly exclusive responsibilities in the provinces have become vastly more expensive, notably highways and education; in the second place that the Judicial Committee of the Privy Council has so expanded the original jurisdictions of the provinces beyond what they were intended to have that they found themselves saddled with grievous burdens which we thought could never be expanded. The responsibilities have been expanded without revenues being adequately expanded to meet them.

There are two ways to meet them: to take another look at the division of responsibilities, or take another look at the division of the revenues. You can in fact do both.

This constant suggestion you get from the rising generation that the Fathers of Confederation didn't know anything, and they were stupid or ignorant, becomes a little wearying. I am not old enough to remember the Fathers of Confederation except Joey of course, and I should not recall him

having any superlative wisdom, but I don't think they were such fools as they were made out to be.

MR. GREATHED: I don't think the remark is directed at the B.N.A. Act. I think the remark is more related to a defect in the system which has not permitted this.

DR. FORSEY: But look what you have written here. You people don't seem to have any sense of the meaning of words or of the context in which they appear.

"One of the most serious defects in the Canadian federal system has been its failure to provide sources of revenue to the provinces under the B.N.A. Act ..."

There is the "B.N.A. Act" sticking up like a sore thumb. It is no use telling me you are not talking of the B.N.A. Act. If you are not thinking of the B.N.A. Act, then you are not thinking of anything at all. What do you put it in there for if that is not what you are seeking, to make this point? Over and over again in these documents I find a deplorable imprecision.

PROF. BRADY: Surely this first sentence is stating in plain truths. It may not be as admirably worded as it might be, but isn't the case that the Canadian federal system after all fails in this matter of distribution of revenue?

PROF. McWHINNEY: Whether it does or not,

is it not the position that the Premier has taken publicly and politically too?

MR. PERRY: It is a "motherhood" clause I think. Why don't we come to the next one.

THE CHAIRMAN: The proposition is really a good "motherhood" proposition. I think the support could be tightened up.

MR. PERRY: If you want to examine the proposition, this would get into the awful implication that no provincial government need ever borrow money any way for the rest of time. I don't think you really mean that.

DEAN LEDERMAN: "Sufficient sources of revenue", this is probably what you are getting at.

MR. PERRY: They can meet every cent of their expenditure from revenues and not borrow any. I don't think you mean that.

PROF. McWHINNEY: Mr. Robarts has made that point so strongly in his speeches, I think it is one of the *données*, and I would not attenuate it. Would it carry greater persuasion and exactness if we said:

"Federal-provincial tax-sharing arrangements
"must be adequate to permit effective
"discharge of the respective constitutional
"responsibilities"?

DEAN LEDERMAN: That would be much better,

because this implies two taxing authorities, each operating by itself, and I think that is a dream.

PROF. McWHINNEY: Mr. Robarts' speech of October last year had some beautiful phrases on this, which I think you wrote, Ian,

DEAN LEDERMAN: There must always be transfer payments, mustn't there? Do you admit that there must always be transfer payments from the central government to the provinces for some purpose or other, even just for equalizing, which is in the last point here; and then the Federal Government has to have more taxing power than its strict responsibilities call for and they are in the act from the beginning. The grant of federal revenues, or part of the harvest of federal revenues to the provinces, is in the original terms of the Act by way of transfer payments but more sophisticated arrangements.

MR. PERRY: There have been several Royal Commission reports on this subject, and I do not think we are going to get very much further than this in a page and a half.

THE CHAIRMAN: All right.

"Canada should be a bilingual, multi-cultural state."

Are you leaving, Bill, because I want to do the Bill of Rights thing before you get away. You have to leave at three?

DEAN LEDERMAN: I have to leave in about fifteen minutes, Mr. Chairman.

THE CHAIRMAN: With the permission of the Committee, I would like to deal with Bill of Rights matters before Dean Lederman leaves. That would take us to --

MR. POSEN: Page 22 in the same group.

THE CHAIRMAN: Page 22 headed "Addendum".
"Fundamental Rights

"The fundamental rights of
"Canadians should be clearly expressed and
"guaranteed by positive legislative
"enactment".

I might mention that this resolution was, am I correct in saying, prepared by the Attorney General's department?

MR. GREATHED: That is correct.

PROF. McWHINNEY: Then the Attorney General has changed his own position on this, am I correct?

THE CHAIRMAN: I said it was prepared by his department.

PROF. McWHINNEY: Oh. Well, has Mr. Robarts endorsed this, or is it still open?

THE CHAIRMAN: What do you think this means, Ted?

PROF. McWHINNEY: I assume that it means something approaching Mr. Trudeau's proposal for a

federal Bill of Rights, entrenched Bill of Rights.
It may be it does not.

THE CHAIRMAN: Because I distinctly
thought of it as statutory.

PROF. McWHINNEY: It leaves that open.
I had better read the supporting material.

Mr. Wishart, as you know, certainly had
expressed really the Dicey English view, which is
the antonym of the Trudeau proposals. This
presumably is in between.

DR. FORSEY: It is a wonderfully
dexterously drafted thing; enables the government
to say it has taken up any position it feels like
taking up.

Incidentally, there is a misprint in line 4:
". . . expressed and guaranteed by positive legislative
enactment" would seem an ordinary statute.

"Guaranteed" seems to mean something more than in 2:

"Any restatement of these rights must
"meet the requirements of our federal
"system of government in a manner
"consistent with the spirit of Canadian
"law and custom."

PROF. McWHINNEY: Look at the next one.

DR. FORSEY: Then it adds:

"Entrenchment is not necessarily contrary
"to this spirit".

So where are you? It is like the 39 articles of

predestination. "Predestination is a damnable doctrine, enjoined so by Holy Scripture," or words to that effect.

"These rights should be expressed in a form which will reflect their development in our laws over the years."

Meaning what? After that comes:

". . any new expression of them must be applied so as not to diminish any existing right recognized by law or usage."

That is all right, but what does the first part mean? Does it mean entrenchment; does it mean non-entrenchment; what does it mean? I don't know.

PROF. McWHINNEY: The province took the position, as I remember it, did it not, that Chief Justice McRuer was studying this matter in a comprehensive fashion, and you did not want to take an a priori position until his report is ready, particularly Volume 2 which is still to come.

Perhaps it would be more consistent with this position, if you want to entertain it, until the McRuer report comes out, if you said: "The fundamental rights of Canadians should be clearly expressed and guaranteed" and cut out the "positive legislative enactment" part.

It is possible Chief Justice McRuer may recommend the British system of no constitutional

special guarantees, but a host of supporting institutional arrangements, institutional offices, ombudsmen, administrative procedure codes and the like.

5 DEAN LEDERMAN: As I read it, it is essentially the position the Government took in February, the Ontario Government took in February at Ottawa.

PROF. McWHINNEY: Are you sure?

DEAN LEDERMAN: But the question ought to be kept open. You remember the pressure there was to put the Charter of Human Rights through first and then go to other things. Ontario's position, as I understood it, was this is a very complex business. There is an antithesis here between the continental and English ways of doing it, if you like, to which one ought to pay attention, and attention had gone to the English common law tradition about these things, that you had to leave it to ordinary statute and judicial precedent.

I do not see anything very different here. The question of whether there was to be entrenchment or not was left open and was listed later as one of the things that was going to be looked at along with everything else.

Entrenchment means that you can only get legislation changed by the constitution-amending process. Nobody at that conference was prepared to say what the constitution-amending process was

or was going to be. Mr. Manning certainly pinned everyone to the table on that one.

Also reform of the Supreme Court was being talked about. If you specially entrench, you enhance the power of the Court. Are you going to enhance it before you discuss how you are going to change it, the power before you discuss how you are going to change it? That was the Ontario position, as I understand it, that the options were open.

Now they are still saying the options are open, with perhaps a little more sympathy than there was given Mr. Wishart's statement for the possibility of entrenchment emerging as the Ontario position,

PROF. McWHINNEY: Why not leave it open still and make it "clearly expressed and guaranteed ineffective ways", something like that.

DEAN LEDERMAN: Mr. Davis has just finished putting through the Legislature in statutory form, and it is in the papers that have been sent to us; Mr. Davis has just been after this sort of thing in the field of education, rights of Franco-Ontarians. It is now in statutory form. Perhaps if we sort out the Supreme Court and the amending process we can go on beyond statutory form, but to have gone that far now is pretty good. A statute of Parliament does always add a lot of prestige in my mind, a lot of validity and a lot of effectiveness.

I do not think this is fundamentally different from the position the Government took in February, keeping the options open at this point. Was this because these other things are still unsettled?

THE CHAIRMAN: Well, in the second bunch of propositions which went out to you late in August, this is all carried forward in two propositions under "fundamental rights" about two-thirds of the way through.

This second group of propositions moved forward from the general objectives into certain particular areas, but it seems to me there is a substantive development there.

Would you like to explain the trend of thought? I think we should look at all of these together.

MR. GREATHED: By all means. I think what we were faced with in the second set of propositions at a number of points, and one of them in particular, was to get off the generalities into some more specific subjects, and particularly to see the problems that one gets into in writing on more specific subjects.

Secondly, I think, given the kind of agenda that we are going to be faced with next week in which some focus will be on the question of fundamental rights, the objects of

the review, object of the whole exercise, we thought it might be helpful if we carried these comments forward a bit.

Finally I would just mention that there was some thought that we might enlarge the scope of the propositions which to date have been presented by Ontario.

So those were the factors in mind when we were making up this second set of propositions which is now in front of you in a considerably amended form.

DR. FORSEY: We seem to have three sets. We have the ones that were dated July 12th, which seem to have come by pack train or dog sled or something or other; then we have this addendum which we got dated July 25th; and the third one which came, I now discover, to us just before Labour Day.

I have become somewhat mystified by this hierarchy of documents. I am a little surprised also that we have spent so much time this morning going over these "Battle of the Boyne" productions which apparently were revised later just shortly before Labour Day. I would feel we might have saved some time. Had I noticed the date and time and realized these last things had come along so much later and presumably modified, I should have suggested this morning that we get on with the final product rather than ---

THE CHAIRMAN: These last things are still in an internal, so far as I am concerned, stage. These ones we have been doing up to now are the general objectives on matters with the exception of that last addendum, which we are involved in discussing the federal drafting committee.

So that the immediacy of these others is perhaps not as great, but because of the relationship here I would like to anticipate the thing a bit.

PROF. McWHINNEY: Later I am going to ask Eugene the precise connotation of the Battle of the Boyne.

DR. FORSEY: 12th July, my dear man. Ask Alec. He is all Irish; I am only partly.

PROF. McWHINNEY: Thank you. It was worrying me for a few minutes.

The second group of propositions really solved this issue very decisively as far as human rights are concerned, didn't they? There is no caution here.

THE CHAIRMAN: On entrenchment? I would have thought so.

MR. GREATHED: As the Chairman, I think, pointed out, this is still being discussed internally.

DEAN LEDERMAN: There is one here saying:

"The written constitution of Canada

"should contain safeguards for the

"fundamental political and personal
 "rights upon which our system of
 "representative parliamentary democracy
 "depends."

And the other one:

"A constitutional assertion of fundamental
 "rights should include protection for
 "any existing rights not explicitly
 "enumerated."

I am quite happy with the proposition that the written constitution of Canada should contain safeguards for the fundamental political and personal rights upon which our system of representative parliamentary democracy depends. I took that position at the Canadian Bar Association before the plenary session a year ago, so I am not going to demur on that proposition. I am not sure it is the policy of the government.

PROF. McWHINNEY: Yes, the thing that would leave the options open would be to delete the word "written": "The constitution of Canada should contain safeguards ...".

THE CHAIRMAN: That is what was bothering me.

DR. FORSEY: Where is the word "written"?

MR. GREATHED: Second word in the proposition.

DR. FORSEY: Which proposition is this?

PROF. McWHINNEY: It is in the second group of proposals.

DR. FORSEY: We have one on which I sent mine in with my comments, and I haven't got it, but Prof. Symons has one which just says ---

MR. POSEN: The set that was sent out near Labour Day that was sent back with comments have been revised, and the ones we handed this morning are revised versions.

DR. FORSEY: I am lost even worse than I thought.

DEAN LEDERMAN: Perhaps the word "written" should come out if you want to keep your options open; but, mind you, this proposition is pretty close to calling for some special entrenchment.

PROF. McWHINNEY: For example, Mr. McRuer, when I was giving evidence to him, I don't know what your own experience was, Bill, that among the things he was tossing around in his questioning was recommending very dramatic changes in civil service and other functioning which he thought would achieve a great deal more human rights without perhaps having a Bill of Rights and things. I won't say that is his final position, but he was tossing it about. He may not, for example, recommend for Ontario an entrenched Bill of Rights; he may not recommend judicial review.

DR. FORSEY: If you are reading your

34

explanation, I don't really see that taking out the word "written" advances you one jot or tittle.

PROF. McWHINNEY: You would have to strike paragraph 2 if you take out "written".

DR. FORSEY: Yes.

DEAN LEDERMAN: If you want to keep the options open, as the statement of the Attorney General's department does, you have to take out "written" and strike paragraph 2.

PROF. McWHINNEY: Yes.

DR. FORSEY: I see more and more reason for a Bill of Rights safeguarding certain things, yes, including possibly some things that the central government has not suggested, and perhaps even leaving out some that it has; but I think also there is a vastly complicated subject. For me this is a terrible lot of discussion.

I am not as well up with the paper we had in the law teachers' association, but somebody from a western state practically said: "Everything is all right. Just leave it to the common law courts. Everything is perfectly safe; nothing to worry about".

PROF. McWHINNEY: It is possible for example, one of the Quebec proposals might include action which, for example, this province might want to support, of uniform Bill of Rights introduced by the provinces without federal action. I would not suggest this is as comprehensive a protection as

35 federal, but it is an alternative approach. I take it that the government can really keep these options open, as McLeod very carefully did in February.

DEAN LEDERMAN: Yes, special entrenchment province by province is a possibility here.

THE CHAIRMAN: How does this affect the next one about the assertion of fundamental rights should include protection for any existing rights, not explicitly enumerated?

PROF. McWHINNEY: It would presumably, to be meaningful, have to be prefaced by a statement: "If it should be decided the Canadian constitution needs to have an entrenched Bill of Rights, then ...", but maybe it is best to strike it.

DEAN LEDERMAN: I think it is superfluous, is it not?

PROF. McWHINNEY: I think, perhaps, strike it.

DEAN LEDERMAN: If you put something in a statute, you don't have to do any more guaranteeing of it. Courts and officials bound by statutes proceed to obey the statutes.

DR. FORSEY: Your explanation there could cut out the whole of the first two sentences, it seems to me, and the first three words of the next one: "If it decided to include a Bill of particulars ...".

PROF. McWHINNEY: That could be made a sub-explanation of the preceding one.

DEAN LEDERMAN: I am sorry, Mr. Chairman,
I must excuse myself.

THE CHAIRMAN: Thank you very much, Bill.
--- Dean Lederman withdrew.

THE CHAIRMAN: Let us go back then to our
sequence. We were back at "Canada should be a
bilingual, multicultural state". Anyone unhappy
with that?

DR. FORSEY: The only thing that worries
me about this is the "Ukranian". I don't know
how many of you have read the stories.

I think our Chairman is critic of the book, so he
presumably has read them all.

THE CHAIRMAN: I read one.

DR. FORSEY: I am sure it was extremely
good and your choice would be excellent, but you will
recall, Mr. Chairman, the very elaborate, documented
account there of the attempt of the Ukrainians to
assert themselves as a very special third nation.
I was impressed by it and rather frightened by it.

I wonder whether we are guarding enough here
against the possibility of all kinds of groups in the
country trying to throw their weight about in quite
marked manner, shall we say.

PROF. McWHINNEY: Is the thrust of your
suggestion, Eugene, that this be stated simply:
"Canada should be a bilingual state"? You would
cut off by this the phrase "multicultural" and also

extended discussion of multiculturalism.

PROF. BRADY: What does "multicultural" mean?

PROF. McWHINNEY: I am not very sure. It seems to me a legitimate point, not only a legitimate point but a desirable point to make, that all Canadians must enjoy the same rights and privileges as any Canadian whose ancestors have been here for generations. I think it is worth saying the English-speaking community in Canada is a heterogeneous one, continually changing with the infusion of many cultural influences, and then about the French-speaking communities; but I am inclined to think that that would be enough, and that you have covered the rest of 2 - cut out the first sentence of 2, cut out the rest of 2 after the sentence beginning: "As more immigrants join the French-speaking community ..." and cut out 3.

I gather that Professor Brady also feels a little uncertain on exactly what "multiculturalism" means. I think it may be a point of interpretation which could cause very serious difficulties.

THE CHAIRMAN: Yes. This, I am reminded, actually originates in a sentiment expressed by the Prime Minister last February, where it lends itself much more readily to platform rhetoric, as it were.

"We believe in one nation, two languages,
"many cultures."

But when you come to put this down coldly as a proposition, it is a little more difficult perhaps to say.

DR. FORSEY: It is rather dubious to me whether an infusion of such other cultures, valuable as they may be, would really mean that you would get the perpetuation of a variety of cultures in the country. I am rather inclined to think you would get, on the other hand, a modified, perpetually changing English language culture, and a modified, probably perpetually changing French language culture, if Mr. Tremblay really succeeds, for example, in assimilating a variety of immigrants into the French-speaking community in Quebec. Even if he does not succeed in all he wants to do, and you get a lot of new immigrants coming to Quebec and adopting the French language, it is quite possible that the culture of French Canada as we have known it will be modified, but I doubt very much whether you will in fact get, as it were, a little Italian culture, a little Ukranian and Polish culture going and subsisting in Quebec, any more than in the rest of the country.

THE CHAIRMAN: I think the point is we do not want either a melting pot or a double boiler, as it were, but provision for the retention of a variety of cultural interests in the country.

DR. FORSEY: Yes, as long as they want to go on doing their special things, it is fine; but I suggest in a great many cases by the third generation they will be like the Polish barber down in the United States who said to my friend on one occasion that he was sick and tired of the way these Polskis and bohunks were coming in and upsetting "our American way of life". My friend nearly burst a blood vessel trying to refrain from laughing. The fellow had an unmistakable Polish name, unmistakable Polish ancestry, and it had not occurred to him.

PROF. BRADY: From the point of view of political practice, constitutional practice, how do you achieve a multicultural state?

MR. GREATHED: How do you put it in words?

THE CHAIRMAN: Can we say: "Canada should be a bilingual state, while retaining scope for its many cultures"?

PROF. McWHINNEY: "Maintaining its multicultural character", something like that; if what you are saying is in fact that that is like the earlier clause which Harvey Perry reminded us was a political imperative like motherhood. I suppose we have to maintain something like this, but the gamesmanship may suggest going around the explanatory paragraph a bit and getting some of these waffling things either more waffling or out altogether.

THE CHAIRMAN: I think we can un-waffle that one. I think we understand the problem here. Eighteen is:

"All governments in Canada should
"provide, wherever feasible, bilingual
"public services."

DR. FORSEY: We have to be careful about the word "bilingual". You might have a lot more French, but there is the actual case of the chap down in Cape Breton working for the C.N.R. who got a form letter from the company saying: "Are you bilingual?". "Yes", and they transferred him, and then there were lots of complaints because he didn't speak any French, but he was not asked about French. He said: "I speak English and Gaelic".

THE CHAIRMAN: Service in the two founding languages.

DR. FORSEY: It is not awfully funny. I am told down in Kitchener if anybody says anything about bilingual there they would assert that that was to mean German and English.

PROF. McWHINNEY: Does this not go somewhat beyond the position the Government has taken up to date? If I am correct in that, wouldn't you want to add a phrase "where feasible and desirable in the interests of substantial justice" or something like that? I do not object to

this phrase as it stands, but I am wondering about it in terms of the government position. Maybe I am wrong.

THE CHAIRMAN: I think it is pretty close, is it not?

MR. BEER: I think it is.

THE CHAIRMAN: Better than pretty close.

PROF. McWHINNEY: I remember a lengthy example in the courts system, the translation and making counsel available, and Cliff Magone raised very definite points of caution which I thought were accepted by the Committee and by the Government.

MR. GREATHED: This is almost verbatim just the February 5th statement that Mr. Robarts made.

PROF. McWHINNEY: I simply want to raise the point, and I accept your assurance.

PROF. MEISEL: "Service in English and French".

MR. GREATHED: Yes, yes.

DR. FORSEY: By the way, shouldn't the "are" in line 2 be "should be able to", that all citizens should be able to? Otherwise you are saying in fact they are able which in fact they are not.

MR. GREATHED: Yes.

PROF. MEISEL: Perhaps in principle they are able.

THE CHAIRMAN: When you mentioned this I was thinking back about how things have changed. You remember a dinner meeting we had with the Prime Minister, and then we sat around in a room in the Park Plaza, which, as I recall, must have been in January, 1966; and Professor Brady began with a paper about the expansion of linguistic privileges in Ontario. I remember a phrase stuck in my mind of Mr. Magone saying: "That is an invitation to political suicide".

PROF. McWHINNEY: Yes.

THE CHAIRMAN: Then the extension of the French secondary schools came in August, 1967, and the election followed a few months after. It is interesting to look back now. I had forgotten that things certainly have changed since we began.

PROF. McWHINNEY: I remember Cliff's phrase and that is why I raised the question. It also seemed to me he raised the issue about the law courts and said once it cannot possibly be done, and he raised the implications of bilingualism which, in an institutional sense, were surprising in the detail and depth that were involved.

PROF. MEISEL: "Where feasible" surely takes care.

THE CHAIRMAN: I think "wherever feasible" is a governing phrase, and I think this is quite consistent with what the task forces internally are

coming up with.

I think Dr. Forsey's point about "in the French and English language" would be worth while.

The next one deals with:

"All Canadian parents should, as a matter
"of equity, be able to have their children
"educated in either of the official
"languages."

Is that too missing the point, "wherever feasible" in terms of our Ontario practice?

PROF. McWHINNEY: No, it links this to equity and not to law, so that is all there can be.

THE CHAIRMAN: Well, all right. What do you think of this one?

PROF. MEISEL: Well, "they should", that is an expression of wish.

PROF. McWHINNEY: As a matter of equity, which means as a matter of morality, natural law, but not positive law.

PROF. MEISEL: In Kingston, for instance, we now have some instruction in French, but it depends on the age of the children. If they are starting, that is fine, but children of a certain age or older children still do not have French schools, while the whole process grows.

DR. FORSEY: Putting in anything like "wherever feasible" at the top there might have the effect of appearing to water it down too much.

I think as it stands it may appear altogether too heady a brew. The explanation really does explain, I think, pretty well. The thing if read together is reasonable enough.

PROF. McWHINNEY: You could drop "as a matter of equity" and make it "wherever feasible" but I think, to be honest, "as a matter of equity" provides, if you wish, the protective obligations of the government.

DR. FORSEY: Yes, with the explanation certainly.

THE CHAIRMAN: In other words, it is an aspiration.

PROF. McWHINNEY: A postulated natural right, but not a legal right.

DR. FORSEY: Yes, an aspiration, and one that the Government of Ontario takes pretty seriously. I think that is evident from what follows.

Amazingly, I am rather inclined to take this whole as it stands. Secretary please note: for once the old crank has been polite.

THE CHAIRMAN: As a practical matter, this would apply to English-speaking parents in North Toronto and the "where feasible" becomes: at what point would you provide across-the-province instruction in French?

PROF. MEISEL: In the mother tongue.

You can say "in either of the official languages":

"... should be able to be educated in

"their mother tongue."

PROF. McWHINNEY: Then you have to add:

"That being either English or French" or you get the St. Leonard problem.

THE CHAIRMAN: It also sneaks in by the back door the official languages. We still only have ---

MR. GREATHED: I think that is correct.

PROF. McWHINNEY: "As an official language used nationally" then.

MR. GREATHED: I think in that context it probably was. I think the languages should be spelled out.

MR. BEER: The resolution in the Legislature on the use of French and English refers to the official languages, does it not? Then you make either of the official languages of the province concerned.

THE CHAIRMAN: Either of Canada's official languages, although Canada's, Ottawa knows, are not both official in the province of Ontario, are they?

PROF. MEISEL: But Canada's official languages are English and French.

PROF. McWHINNEY: This has a precise national connotation at the national level. We are told there is in Ontario, but is it a term of art

legal nationally?

DR. FORSEY: Why not just say "French and English" and let it go?

PROF. MEISEL: Except it does not take care of the point that I referred to, that all of Forest Hill citizens/may decide to have all their children taught in French.

PROF. FOX: Looking at the philosophical point of view, which you have been doing, surely the philosophical conception is that parents have a right to determine in which language a child is educated. We seem to be imposing on them another moral assumption if we say it has to be the language of the family.

PROF. MEISEL: I would agree with you personally, Paul, but I am not quite sure whether the Government of Ontario would be willing to go this far.

8 PROF. McWHINNEY: A postulated natural right does not carry with it a right of self-legislation. It does not automatically follow that you have this kind of equity, that you can have a school set up in your area. I think this has taken us into another domain. It is a response to St. Leonard, isn't it?

THE CHAIRMAN: Except this preceded that, July 12th. This was done on Orange day.

DR. FORSEY: I don't think the example of North York is one that we need worry about.

I do not think you are going to have a very large number of parents in a predominantly English language area wanting to get their children taught in French. You may have some, but I doubt if you will get a tremendous number.

Similarly, I doubt if you will get a tremendous number of French-speaking parents in a predominantly French-speaking area insisting that their children shall be instructed exclusively or mainly in English.

PROF. MEISEL: I am not sure. There are already examples, I gather, where they have French schools. Kingston is one, and Ottawa is another, where enough English families want their children brought up bilingually so that they would like to send them to French schools. It is not a very large proportion of the total population but it is a large proportion of the school enrolment, and some principals of the schools are faced with the situation that perhaps 50 or 60 per cent of the students are not French-speaking. So, for instance, the playground language is very much English and in effect the French children become anglicized in the school and the English children do not speak French in their out-of-school period.

So, you know, there are some problems here which I think perhaps one might try to avoid.

MR. PERRY: This does not cover the

parents who would like to have their children educated in both languages, either.

PROF. MEISEL: Could one just have another explanatory paragraph simply saying that this principle or proposal or proposition is intended to apply primarily so that the mother tongue of the children can be preserved, but that whenever possible it should also be applicable to anyone?

DR. FORSEY: Of course, it may become a considerable problem in Ottawa, possibly other places, where people like to have their children going into a bilingual central civil service and they say: "All right, I don't speak any French, but Johnny is anxious to become a big shot in the federal civil service and he has darn well got to have some French, that's all, and I am going to send him to a French school".

PROF. MEISEL: Whether he likes it or not (laughter).

THE CHAIRMAN: By the time Johnny gets through, the federal civil service will be speaking Esperanto.

PROF. McWHINNEY: Or Russian or Chinese.

MR. BEER: This is a good point, though, in that we had on the committee on French language secondary schools quite a few areas send in briefs, and there was a group in Toronto that brought in a

brief asking what we might be recommending with respect to bilingual schools for English speaking students. We said that we were not getting involved in that, but they should carry their campaign further to the local Board and to the Minister. So this is going to happen.

THE CHAIRMAN: This is why I raised the point. Isn't this why I sent you?

MR. BEER: Yes.

THE CHAIRMAN: However, I think we have got the spirit there. I don't want to rush this but I do want to get through.

PROF. FOX: There is just one assumption in the first line of the explanation (and this has nothing to do with a linguistic one) but it has to do with the equality of educational opportunity. Maybe the intention of the people who drew it up to do this, but Ontario has committed itself to the equality of educational opportunity throughout Canada.

THE CHAIRMAN: Yes, that is quite a project.

PROF. FOX: It might cost some money for Ontario.

DR. FORSEY: Perhaps you should put in some qualifying phrase like the traditional one of the Anglican curate: "My dear brethren, we must all confess our sins to some extent and repent in

50

measure, or we shall all be damned to a certain degree". You are drawing, by the terms you have expressed here, an end for the whole country, but obviously this is easier for Ontario to carry out than it is for other provinces.

MR. BEER: You could simply omit that.

MR. GREATHED: Yes, that is the easiest and cheapest way.

DR. FORSEY: You can insert "as far as possible".

PROF. McWHINNEY: Isn't this area again of high political significance?

THE CHAIRMAN: No, it is fine to assure equality of educational opportunity, but that is a sentiment that can be expressed elsewhere than here.

MR. GREATHED: Yes.

MR. BEER: It is a phrase they use in the Department of Education.

THE CHAIRMAN: It is a good old phrase. We have done the rights, that is, the "motherhood" part. Now we come to the sons and daughters.

I think, in view of the time, if you would like to take the tea or coffee to the table here, I will keep cracking the whip.

--- Short recess

THE CHAIRMAN: In this group we have been trying to tighten up and toughen and be more particular. The first deals with the object of the whole exercise:

"As a minimum the constitutional
"conference should review the language
"and terms of the British North America
"Act, repeal obsolete clauses, and revise
"those inconsistent with the character
"of the Act as Canada's constitution."

It is not "of Canada's constitution"; it is
Canada's written constitution.

MR. GREATHED: Yes, I have got that.

PROF. MEISEL: Even that is not entirely
accurate in that statutes after all are written.

THE CHAIRMAN: Are written.

PROF. FOX: Formal? The phrase used was
fragmentary.

PROF. MEISEL: For this purpose maybe
law
fundamental/or something, organic law.

PROF. McWHINNEY: Which page are we on?

MR. GREATHED: It is the new set.

PROF. MEISEL: That isn't so good.

THE CHAIRMAN: These went around too,
did they not?

MR. PERRY: This may be a slightly
revised version.

THE CHAIRMAN: This set that goes around
here was sent to you in the end of August and
incorporates your suggestions and comments.

DR. FORSEY: A lot of this is just sheer
tidying up.

THE CHAIRMAN: Tidying up.

DR. FORSEY: But some of it I think raises some questions. I would like to have something a little more precise on the matter of Section 55. I haven't the British North America Act in front of me and I don't know it from memory. I can't remember exactly what 55 says as to Royal discretions, consent to legislation.

Also, the question of reservation and disallowance, in 57, that is well enough; 90, disallowance and so forth, provincial legislation, that, I think, does raise some question. What exactly does 55 say?

MR. GREATHED: We are just getting a copy.

PROF. MEISEL: Whereabouts are you?

DR. FORSEY: Page 2, section 5 of the memorandum, dealing with different sections of the Act, one of which is No. 55, Royal discretion as to Assent to legislation. I wasn't quite sure what it is we are proposing to have cut out.

PROF. McWHINNEY: There is a related issue that is, I suppose, of more general principle than related to the more specific point that Eugene is raising.

We were talking about two basic stereotypes of constitutional drafting earlier, and I suppose there is one very general question: whether the

provisions detailing the practice, procedure of Parliament and the like are appropriate or necessary in a constitution. It is a long document. I suppose in some senses if you add up your recommendations, you are recommending a shorter and tighter document without developing a general principle that the constitution should attend to the main functional problems but not setting them out in detail.

THE CHAIRMAN: You want to refer to that?

MR. GREATHED: Section 55 reads as follows:

"Where a bill passed by the Houses of
"the Parliament is presented to the
"Governor-General for the Queen's assent,
"he shall declare, according to his
"discretion, but subject to the provisions
"of this Act and to Her Majesty's
"instructions, either that he assent
"thereto in the Queen's name, or that he
"withholds the Queen's assent, or that he
"reserves the bill for the signification
"of the Queen's pleasure."

DR. FORSEY: My point is you can cut all that out or only part of it; because if you are proposing to cut out the business about the Queen's instructions, they are gone now anyway. They are Letters Patent and it is of no consequence at all, and is mere tidying up. If you are proposing to

cut out the reserving of the bills for indication of the Queen's pleasure, that is as dead as the dodo constitutionally speaking, because there have been no reservations since 1886. That is all right, but if you are proposing to cut out that he gives the Queen's assent or withholds assent, well, I don't know. If you cut that out, what is really left? It is probably a purely formal thing now, although, of course, as late as 1880, if my memory serves me, the British Government said if the House of Lords passed certain private bills, the Government would advise the Queen to withhold her assent and the House of Lords caved in. I don't remember the exact date of that. At any rate, the Government didn't want it and the Government said: "If you pass this thing, we will advise Her Majesty to withhold her assent".

PROF. BRADY: This was discussed again in 1912.

DR. FORSEY: It is conceivable that the Government might advise the Governor-General to withhold assent. I think it is very unlikely, but I wanted to be sure it had been thought out.

I wondered also, if you are going to keep the Monarchy at all, if there is not some symbolic value in having the formal provision as to the Royal assent.

PROF. McWHINNEY: In relation to what

you are discussing, on the Canadian scene it would have to be the situation of a minority government. There may be a private or three-party bill going through Commons but not being treated by the Government as a confidence ~~matter~~, and then going through and being adopted by the Senate.

DR. FORSEY: The Government might at some later stage in the proceedings begin to feel that this thing really wouldn't do it; that it had hidden dangers or something; there being no provision in our constitution, such as there is in the British constitution, for referring back at any stage of its progress to be reconsidered by the House.

PROF. McWHINNEY: I wonder if this would not tie into the broader principle I was raising while waiting for the B.N.A. Act to be produced. You could ask whether you need to have a provision on the Royal Assent in at all in the constitution; in other words, a tidying-up process and a more streamlined Act might cut these things out altogether.

PROF. BRADY: Surely the assent or dissent is a pretty dead thing now. It does not eliminate the significance of the Monarchy, that aspect of the Monarchy. It is hardly of consequence for an existing democratic state.

DR. FORSEY: Better here than it is in Great Britain, it is part of the dignified part of

the constitution. If you are going to get rid of the whole dignified part of the constitution, you will get rid of more than this provision for Royal assent; you won't have a Speech from the Throne in the Senate, Gentleman Usher of the Black Rod.

PROF. McWHINNEY: It is better with the hereditary monarch than it is where one appoints a local national for a term of years and they are appointed by the government of the day. I could well see the office reviving now that the hereditary or foreign elements disappear.

PROF. BRADY: There would be all the stronger objections to the use of such a power under those circumstances.

PROF. McWHINNEY: I am not at all sure, because now it is not an English Queen that is being criticized and who therefore becomes psychologically at fault; it is a local figure appointed for a term of years by a government and needs to be appointed. Why shouldn't he introduce his countervailing power? I am not suggesting Mr. Michener would do it, but I can see actually a case for reviving now the power.

PROF. MEISEL: There is a real problem (this is a different issue) in that we are going to have minority governments from time to time, and I think it may well be there may be moments when there may be some question as to who will be able

to get a majority in the House of Commons. I think the Governor-General will have to have a certain pretty important position and we cannot do away with him, but that is another issue.

PROF. BRADY: Certainly it is a discretionary power. I am not suggesting that all discretionary power would disappear, but the question of assent or dissent to legislation, I think it is a power that is not really exercised.

PROF. McWHINNEY: But if you could take it out altogether and leave it a convention, there is a case for a short constitution, you know, and if you are trying to do that in Canada you have just about cut everything in this area out of the constitution. Not out of your constitutional law, because on these parts that is the area of convention law with the limitations we know of precedent and practice which exist there.

THE CHAIRMAN: I wonder, perhaps at this point we should not go too far into these details. These are included to indicate points that we believe require some attention under different categories; but certainly long before we can deal with these in terms of the specifics we will be leading to our task forces, I think, of this Committee, and look at them in some detail. If the general objective is acceptable to you, perhaps we might go on.

DR. FORSEY: On the second page, No. 5 says:

"The following sections of the Act

"should be redrafted"

In some cases it seems to me they should be repealed, - Royal discretion as to Seat of Government and disallowance of Dominion Acts, reservation of Dominion bills. They should just really go out. They are totally obsolete.

On the other hand, the possibility is that Sections 18 and 55 should be looked at to see whether some redrafting is advisable.

THE CHAIRMAN: Some of them are in the wrong category.

DR. FORSEY: I am a little inclined to think so. On the other hand, Section 90, it seems to me, where you are dealing with provincial legislation, it seems to me that part is now as dead as the dodo. Still, it is just conceivable in the absence of some effective entrenchment or other protection of civil liberties, basic rights and liberties, this might afford at least a shadow of protection against certain of such things. I don't know. I am not quite so certain that they should be provided unless as a quid pro quo for some better protection of rights and liberties than this section affords. That would be a lot better, I might add.

THE CHAIRMAN: We will need that one.

Next ---

DR. FORSEY: On this last page here, is this well expressed?

"The above enumeration does not purport
 "to be exhaustive. Furthermore, these
 "changes are exclusive of any which might
 "be deemed to be desirable for other
 "reasons."

It seems to me that might be taken to mean: "Those changes can only be introduced which might be desirable to be accepted for other reasons", which is the very opposite to what is intended.

PROF. McWHINNEY: Should be stricken.

THE CHAIRMAN: All right.

"The written constitution of Canada should
 "contain a preamble which would set out
 "the hopes and aims of the Canadian
 "people and their reasons for preserving
 "a federal union."

PROF. McWHINNEY: Who wanted this in, Mr. Chairman? Did this emerge at one of your previous officials meetings?

THE CHAIRMAN: No, these are all internally generated. Perhaps, Ed, you can comment on the objective there.

MR. GREATHED: I think they are an effort to clarify some of the objectives of what we were

trying to do in this whole Committee in our relationship to the conference, we attempted to set these out as perhaps a starting point for this sort of thing and give some consideration to bringing together a number of the general propositions which had been expressed on objectives and so on, and maybe take them in the preamble.

PROF. McWHINNEY: Yes, I think in the gamesmanship of constitution-making there is a certain tendency to be skeptical about preambles. The epithet that Donald uses: "The term 'constitution' is usually ascribed to one of the preambles."

As John says "poets were put to work there". I have heard the U.N. charters put to music and sung and it sounds well; but again this is an antipodal type of constitution-making to the ---

THE CHAIRMAN: Surely poets have a right at the public trough too.

PROF. McWHINNEY: Silences the poets who are frustrated poets who draft the preamble.

PROF. MEISEL: I think there is probably some room for this, partly as an exercise of getting people to think about the common areas.

I may be again betraying my origin here, but I think surely one thing that makes Canada distinct from the United States is this bi-ethnic thing. I think if something can be put into the constitution indicating that here are two ethnic

groups living together and trying to achieve certain common ends under one roof that leaks only seldom, you know this is something that is really trying. A pity Pratt isn't still living.

PROF. McWHINNEY: Which one?

DR. FORSEY: There are a lot of other things that mark us off from the United States.

PROF. McWHINNEY: One of your problems is the constitution of a preamble in common law terms, and even those countries not bound by common law principles have had a common history.

I went through the Irish cases from 1937 on at one stage, and these were only referred to once, the preamble, and most people felt that was a gain to the exceptional one from which the Irish was copied. Of course, it only lasted six years and was never referred to.

PROF. SYMONS: Isn't dead against the idea of a preamble. I was especially attracted to the potential of the preamble, a good one, and I wish they had thought of it a hundred years ago. I think there is a tremendous danger, and may still be a good thing to risk, but danger of getting stuck with some absolutely exaggerated expression of pathos.

There are a goodly number around to choose from. The Canadian Junior Chamber of Commerce has produced a dandy that they are currently this year having all the school children of Peterborough learn.

PROF. MEISEL: Will you recite it, please?

A MEMBER: Written by a poet?

PROF. SYMONS: I may be able to. I was so staggered. I am just a little cautious about the danger of really getting stuck with something incredibly poor.

DR. FORSEY: McLuhan might adapt it.

PROF. McWHINNEY: Bob Dylan would do a better job.

PROF. SYMONS: I felt on this one point a little fellow-feeling with Professor Creighton. I did feel like Gabon, that she might have an extra one while they are working on theirs, or if we could have the runner-up to the one they select.

I am very cautious about this, having seen some awful drafts - not against it, just cautious.

PROF. FOX: Put in a third explanation, to refer it to the Parliamentary Committee when they finish re-writing the words of "O Canada".

PROF. McWHINNEY: Maybe it could be in the final text of "O Canada".

DR. FORSEY: May be a perfect example of the sort of thing Tom Symons is afraid of. I am not very unhappy, except for the explanation here, which in my judgment is unnecessarily patronizing. I do not think the British North America Act does emphasize the colonial status of the original provinces. It mentions it. I don't think it does emphasize the importance of the British Empire.

Of course it mentions it; and of course it mentions the authority of the British Parliament. There wasn't anybody else to do it.

THE CHAIRMAN: Noting all these cautions and the particular points Dr. Forsey raised in item 2 ---

PROF. McWHINNEY: May I suggest a Wiemar constitutional solution, in that you put both sides in your preamble and say: "Whereas the constitution is colonial and anti-colonial". The Wiemar did this sort of thing. If you put the antonym in, this solves the problem.

PROF. SYMONS: I wonder if the proposition might say just possibly: "Consideration to be given to the desirability of having a preamble to our legal constitution"; and then that these questions should be considered, rather than stating point blank that it should contain a preamble. I think it would be nice in, if it were a good enough one.

PROF. MEISEL: I agree. It is hard, once you launch the thing, it is very hard for the Committee to say: "Well, it stinks".

DR. FORSEY: Written by one of the Canadian poets, or , as I said before, by McLuhan.

PROF. SYMONS: Or Peterborough Chamber of Commerce.

PROF. MEISEL: I wouldn't rule it out

at this stage.

PROF. SYMONS: No.

PROF. MEISEL: I think all this reference, and to Gabon, I think it is patronizing. Some of these countries are great countries despite ---

THE CHAIRMAN: Their obvious inadequacies.

PROF. BRADY: I do not think, Mr. Chairman, in the middle of the afternoon, we should attempt to write a preamble.

PROF. McWHINNEY: Or even to write poetry.

THE CHAIRMAN: We will give a prize for the best preamble.

PROF. McWHINNEY: Are we allowed to compete?

THE CHAIRMAN: Oh, yes. This Committee may even sponsor the O.A.C.C. preamble prize.

DR. FORSEY: Open only to multicultural contestants.

THE CHAIRMAN: The next one, which apparently defies explanation:

"The achievement of Canadian unity through
"the alleviation of regional economic
"disparities is a goal of the Canadian
"federation, and should be recognized as
"such in the preamble ..."

DR. FORSEY: That part of your preamble is easy. Just get Joey to approve it before he shuffles off.

MR. GREATHED: That is the solidarity issue.

THE CHAIRMAN: We had about two hours discussion in the committee of officials on the meaning of the term "Canadian unity".

PROF. BRADY: This is not intended to be introduced in the constitution?

MR. PERRY: It is going to be put in the preamble.

PROF. McWHINNEY: It is paragraph 1 of the preamble.

DR. FORSEY: I remember out at Banff four years ago we were instructed by M. Philippe Carre if I remember correctly, that "unity" was one of the words we must not use. I suggested at the time that perhaps he and his friends draw up a list, French-speaking friends, draw up a list of the English words we were not allowed when talking English. There was already a formidable list at that time. That was a new addition.

I daresay you get the same line of "how many angels come down on the point of a needle" discussion in your Committee.

PROF. FOX: I think seriously this is an important consideration on money matters. Maybe it isn't.

THE CHAIRMAN: Certainly it is for the Committee.

PROF. FOX: Maybe it is not such for the preamble, but I do not think, as the wealthiest province, we ought to lose sight of the fact that this is more meaningful to the rest of Canada than linguistic problems.

THE CHAIRMAN: I think that is why we suggested it in fact.

PROF. SYMONS: I agree with Professor Fox, it is just of fundamental importance. I think that that beginning, that the preamble is a moot point anyway, and I think it downgrades the importance of the regional economic disparities.

THE CHAIRMAN: Why not just leave out the preamble part here - "... is a goal of the Canadian federation and should be recognized as such".

The next one is one we discussed in part this morning.

"A suitable amending formula must be an
"integral part of the constitution of
"Canada."

PROF. FOX: The second sentence is not accurate in the first explanation. "Any change which Canadians might desire must be ratified by the Parliament at Westminster". Surely under 1949 No.2 you might have changes.

DR. FORSEY: Absolutely not. I speak with assurance on this point, because this is the point that Professor Lederman took up in a letter

which he sent to the members of the Secretariat, if I remember correctly, of which he very kindly let me have a copy.

The final move must be, in his view - and certainly in mine and certainly various other people, and I mention him first because obviously he is the person who speaks with most authority, but myself and the others I am thinking of anyway; the final point must be an act by the Parliament of the United Kingdom renouncing all further jurisdiction.

I do not know how you could do the thing. The 1949 Act, it seems to me, quite clearly has actual restrictive application, and an act of this sort as contemplated here - adoption of a new constitution passed by the Supreme Court of Canada under the terms of 91(1) it seems ^{to me} clearly ultra vires - far beyond the power which the British North America Act 1949, No. 2, conferred on the Parliament of Canada.

PROF. McWHINNEY: What about accompanied by provincial legislation? For example, Frank Scott at one stage suggested a procedure for establishing a new constitution. I would not accept the view that under all circumstances you would have to go to London, but I would agree with you that the simple federal legislation without being accompanied by at least the consensus of the provinces would be

unconstitutional; but I could see the constitutional relation occurring solely in Canada with the federal and provincial consent behind it.

DR. FORSEY: By what authority would any provincial Legislature legislate in such a field?

PROF. McWHINNEY: One way I would think would be by Parliaments -- assuming you can get political agreement acting together - the Dominion and Provincial passing declaratory legislation. I believe that would be sufficient to establish a new constitution. This is essentially suggested by Frank Scott as early as 1949.

PROF. BRADY: This is a very controversial matter actually.

PROF. McWHINNEY: I would agree, but I am simply saying that I do not think it is correct to say that there will be only one position on it.

DR. FORSEY: Surely it is a simple thing to get agreement here and get the final act at Westminster, the kind of thing proposed in the Fulton-Favreau formula. Why make a song and dance about it, which brings both the Parliament of Canada and the Legislatures in the position where they simultaneously commit an illegal act?

PROF. McWHINNEY: The idea may be that it is illegal but it might be politically acceptable to do this, it might be.

I agree with you the most rational way is

through Westminster. It may be it is politically unacceptable with the balance of forces we have now or at some later time.

PROF. FOX: This was not the point I was arguing. I am arguing the two sentences in conjunction.

"At present there is no satisfactory
"method of amending the Canadian
"constitution. Any change which
"Canadians might desire must be ratified
"by the Parliament at Westminster."

Now, that is not true.

DR. FORSEY: That is not true. Making the change can be by simple act of Parliament.

PROF. FOX: Depends on what kind of changes Canadians may desire, but at the moment it simply is not accurate.

DR. FORSEY: There is a whole string of things the Parliament of Canada can do by itself.

THE CHAIRMAN: Just leave that out.

MR. GREATHED: The two sentences.

PROF. McWHINNEY: Or even one sentence.

DR. FORSEY: "Certain changes which Canadians might desire ---"

PROF. FOX: Yes, whether or not at the moment there is a satisfactory method, I would say in certain regard there are satisfactory methods at the moment.

DR. FORSEY: There is no completely satisfactory method.

PROF. FOX: All right.

DR. FORSEY: "Certain important changes that Canadians might desire must be ratified by the Parliament of Westminster"; for instance, any change in the distribution of powers.

THE CHAIRMAN: All right. The next two we have done, and that takes us on to the passage of 3 on the judicial system finally.

"The constitution should establish the
"Supreme Court of Canada as the federation's
"final court of appeal."

PROF. McWHINNEY: I read this one quickly a few moments ago and it seemed to me this is a lot more significant in what they do not say.

I notice, in other words, there is nothing said on the issue that was discussed in the Committee here, certainly been discussed at political level, to the final appeals on the Civil Code of Quebec or final appeals on private law. In a way you have avoided taking a position on any of these things, so they are relatively harmless.

THE CHAIRMAN: In the one extreme they are relatively harmless, but at the other extreme they have enough positive thrust to be significant.

PROF. McWHINNEY: Not much. The only one that has much to it, I would say, and this is

something which could be achieved by the Federal Government by legislation, is the last one giving the Court the power the United States Supreme Court had since 1925, of some degree of discretionary control over the amount of business; but that is an issue in a way that you did not even need to take a decision on. It does no harm but I do not think it is fundamental.

THE CHAIRMAN: What about guarantee of security? Are you thereby stuck for life with an incompetent?

PROF. McWHINNEY: There is the age factor, of course. It is now 75.

THE CHAIRMAN: Quite a long time if a chap is 40.

PROF. McWHINNEY: It is possible, though, following your point, it is possible as it now stands, this could be construed as guaranteeing life tenure.

DR. FORSEY: Now, surely security of an office does not entirely exclude removal; because I should say that the judges of the High Courts now enjoy security in office, but there is provision for removal.

THE CHAIRMAN: That is true - Landreville.

DR. FORSEY: Yes, and it has not been invoked very often and never successfully and it may not be a satisfactory method, but it does seem to me you cannot give any people security without

making out a little control by removal. I am not familiar with the rule governing academic tenure, but surely when somebody gets into a university it does not mean that in no circumstances he can be disposed of. If he goes out of his mind, for one thing, surely he can be removed. Surely if he is chronically drunk and never turns up sober for classes, there is some means of getting rid of the person.

PROF. McWHINNEY: Or he is deaf or senile. We know the greatest of American judges did not hear for the last several years of his period on the Court. He was 92 when he ceased, I think. We know several have been positively insane. In other words, I think it is not a major point, but I think you could probably say "subject to life of good behaviour".

At least in one case there was an improvement, because it reduced the gentleman's tendency to be loquacious.

PROF. FOX: Salary provision has been used by the government as a threat in the past, as a means of encouraging a member to resign, for reasons of health. It could not be proven publicly if one did not wish to, and this is a significant change.

I think Eugene's point is good, that maybe it needs to be thought out more clearly what

method of removal you can lay down.

Of course you can still have the person removed, but that has never been applied in the case of a Supreme Court judge, has it, the present method of removal?

DR. FORSEY: There have been several attempts. One back in '68, I believe; then another one in the '70's, against another judge in Ontario. Then an attempt was made to get rid of Chief Justice Wood of Manitoba in 1881 but he died before it got very far. As far as I have been able to gather, there was no other until Landreville, because I think by common consent the procedure left something to be desired, like the judge himself.

PROF. McWHINNEY: Only because he didn't play the game.

DR. FORSEY: One of the wildest affairs I ever went through in my life.

PROF. McWHINNEY: Do you want to take a position on the age factor? In some ways it has operated adversely to the Canadian Supreme Court. It may be argued that some of the best judges were prematurely retired at 75, some of the most flexible and youthful judges. You want to put something in about that as a safeguard?

DR. FORSEY: You are in a difficulty there, because it makes it much more difficult if

the old boy is "off" and they really do become senile. It is like compulsory retirement. There is a compulsory retirement age, and the chap still thinks he is as good as he was, and he isn't. You can say: "Poor old Fred, he isn't much good, but after all he was all right in his day and we can put up with him for another twelve months"; but if there is a procedure that you have to put up with him until you can finally convince him he has to be thrown out at 65 -----

PROF. McWHINNEY: Why not: "subject to the usual considerations and good behaviour"? Good behaviour is the legal term used.

THE CHAIRMAN: Any other questions on this one, these propositions?

PROF. FOX: I am not sure enough about procedures of the court. Maybe somebody could enlighten us once again on the last item: "Should be by leave of the Court".

PROF. McWHINNEY: The Court is compelled to hear all cases subject to their meeting the statutory limits as to minimum sum in issue in civil cases and the like. The United States Supreme Court, by comparison, has, with the exception of one category, complete discretion. Four thousand matters a year go to the United States Supreme Court. It just takes 200, which is the 200 it considers most important. The Canadian Supreme

Court has no control over its own jurisdiction in terms of numbers of cases.

PROF. MEISEL: This in a sense makes it pretty well a constitutional court, I suppose.

PROF. McWHINNEY: The American court, yes.

PROF. MEISEL: This would have the same effect in Canada.

PROF. McWHINNEY: This provision would enable it, much more than the American court, perhaps, to become whatever kind of court it wanted. It could therefore do all constitutional cases, and I assume it would want constitutional. The American court's work is limited, of course, because of the difference in the jurisdictional basis of the American federal judiciary to federal questions anyway. Even private law questions must be federal before the Supreme Court has jurisdiction. This is an extra discretion that the Judicial Act of 1925 gives the court, to apply what is called an impossible criterion to the taking of cases.

PROF. MEISEL: Could that mean that the court could in that situation decide, perhaps under the influence of strong and eloquent advocacy of Quebec lawyers, that it would simply refuse to become a constitutional court, and therefore there would be no appeal from the Quebec Supreme Court?

PROF. McWHINNEY: It depends how it is

done. The American discretionary system operates on this basis that as long as four judges out of the nine say they would like to hear a case, it must be taken up by the Court. It would depend what details you worked out, but it would enable the Court, presumably, if they had four obscenity cases, one in Manitoba, two in Quebec, one in Ontario - let us say the Quebec one was "Lady Chatterly's Lover" and the other was "Fanny Hill" - to say "We will read 'Fanny Hill' this time and it is too bad for the other book or provinces. We will give one ruling on obscenity this year instead of four".

PROF. MEISEL: I think this is a marvellous idea, but what frightens me - if one had some assurances it would become a constitutional court, I think this is almost essential, this and the putting a limit on cases; but on the other hand if it can mean that the Court would simply abdicate its role as a constitutional court, then I think it would be very dangerous.

PROF. McWHINNEY: These are directed to different points. One point is simply the work load as a Court to function as an efficient court; that is why I suggested this as it stands is perhaps irrelevant to our exercise.

All this would do would enable the Supreme Court to limit itself to about a hundred

cases and year and become more efficient, because it could do more and more research and take more time.

Incidentally, coming up to the issue you raised, specialization can be achieved by the back door by discretionary controls for the number of cases; but the normal way of approaching it would be through the method that the Committee of Officials has avoided - the issue whether there should be Supreme Court specialization as such, special and constitutional courts and the like. I take it though, that you wish to avoid committing the Ontario Government on this point, so you deliberately left it out.

What you left in is in reality a non-constitutional point; but the obvious presumption, the Court has too much work to do now and is not as efficient as it may be because of that; but this reform would not affect the range of subject matter.

THE CHAIRMAN: I wonder if we could conclude that item at that point.

May I say that I found this day immensely helpful and practical and stimulating to the work we are doing. I think it has been very much to the point.

There were just two items, to revert to the agenda, item 2 and 3, which I can deal with

briefly.

One is the future work of this Committee. As we agreed to do, the steering committee met in July to consider the work of the Committee, and we agreed that the present existing task forces should be retained in their form and employed as need be to assist in this work leading to constitutional revision ; and that the main work of this Committee should continue to be focussed on the build-up of work for the Continuing Committee of Officials. We will see next week what the state of progress is.

Whereas we agreed to set a statutory meeting, as it were, every quarter, I think I would like to leave some flexibility that as the work comes in, with the ebb and flow we shall convene the task forces or the full Committee as our sense suggests.

I know that before too long and certainly before any federal-provincial conference, the Prime Minister would like to have another session with you at whatever kind of time he can make available.

There is one other point that I would like you to ponder. We need not settle this today, but you recall we produced three back volumes in the Spring a year ago which were tabled in the Legislature, and eventually became the red covered books. We have accumulated quite a number of

papers since then, done by members of the Committee or for this Committee, and it occurs to me we might want to consider publishing in that original form Volume 4 papers, which fills out our work, and some of which I think should receive wider attention and are of very high quality.

As I say, I don't think we are quite at the point of being ready to do that, and perhaps the Committee might just ponder it before another meeting and see if you think this is worth doing.

DR. FORSEY: May I suggest it would be useful if you or somebody would draw up a tentative list of the documents that you think might be suitable for inclusion.

THE CHAIRMAN: I think this is a good idea. As a matter of fact, if I can just give my own bias, both to give a wider indication of what the Committee has been doing and, more importantly, because I think some of the papers deserve a little wider audience.

I would like to see another volume, and I think this suggestion would be accepted, if we drew up a list of what we have and sent it to members of this Committee for your comments. You can let us have your comments before we make a decision.

Would you pass this around - a sample brochure that has been printed up as part of our

81
13
stock-clearing activity, as it were - order form
for the background papers, which is the red book
that you contributed "Canada of Tomorrow";
Confederation of Tomorrow theme papers; and the
Confederation of Tomorrow proceedings. You can
do a package order here.

MR. GREATHED: I think members of this
Committee will be receiving complimentary copies.

THE CHAIRMAN: You don't have to send
in your order: you automatically get your book.

PROF. FOX: This is useful to have
for our students.

THE CHAIRMAN: What is your plan for
circulation of these?

MR. MURRAY: It is going to all public
libraries in Canada, to the Department of Political
Science and the Library of all universities and
colleges; and distribution also going to secondary
schools in Ontario. Then we have our own mailing
list of people asking specifically for information
on these books. So every university in Canada
is going to have one or two of these going around,
but if any of you would like extra copies to
distribute to students and so on, we should have
several.

PROF. FOX: It is very attractively put
out.

THE CHAIRMAN: The one item that remains,

I may just ask Ed Greathed to give a very brief report on the state of progress of the four task forces which are meeting within the Government in Ontario.

MR. GREATHED: Mercifully, it will be brief. It is just a progress report, simply to inform the Committee that the four task forces report, each of them, are almost in draft form now. We hope to have them in the Prime Minister's hands by the end of this month or very early in October - report on municipal affairs, provincial public service, Legislature and provincial statutes and judicial administration. They will be sent directly to the Prime Minister by the Chairman of each of the respective committees.

I might say that these reports, of course, were mentioned in Mr. Robarts' speech of February 5th, and the work formally got under way in March and April. It has taken us longer than we thought initially though, because of some very fundamental investigations which had to be undertaken, and which I don't think had ever been undertaken before. We had to do, if I may use the phrase, a little more basic research than we had perhaps thought was necessary at the beginning. However, the Prime Minister should have them either at the end of this month or early next month.

PROF. BRADY: How long are they?

MR. GREATHED: Each runs for approximately 30 pages. We have tried to keep them short. We want people to read them and we have tried to keep them as tight as possible.

THE CHAIRMAN: Are there any other matters of business that you would like to bring before the Committee?

PROF. FOX: Do I understand from your remarks that you are not setting a date now for another meeting, but making it subject to the way ---

THE CHAIRMAN: Yes, I thought we would agree on some statutory basis, as it were, to set aside the third Friday every third month, four times a year; but I really think we will have to see how the discussions go as to whether it is more useful to give time to calling the whole Committee. As I say, I think this particular day has been very helpful. We may find that when we come back next week things have proceeded to a point where I would like to have another early meeting of the Committee. I would like to feel free to do this. It may be certain items under the headings of the different task forces have reached a point where we should have the task force together. I think some flexibility now would be an advantage.

MR. GREATHED: December 20th would be the third Friday.

PROF. MEISEL: I suppose it would be too

awkward to make us think about the kind of issues that are likely to come out of this meeting, but if we had some idea of the sort of areas within which we ought to be mulling things over.

THE CHAIRMAN: We could try to produce, I think, a brief report from the meeting, with some indication of where it seems to be heading.

PROF. MEISEL: If it could be done without adding to the work of the staff to any great extent, it would be useful.

THE CHAIRMAN: We will do that if we can.

--- The meeting adjourned at 4.30 p.m.

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